IMPACT OF FEDERAL ANTITRUST ENFORCEMENT POLICIES ON SMALL BUSINESS

HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST AND RESTRAINT
OF TRADE ACTIVITIES AFFECTING
SMALL BUSINESS

OF THE

COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES

NINETY-SEVENTH CONGRESS

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IMPACT OF FEDERAL ANTITRUST ENFORCEMENT POLICIES ON SMALL BUSINESS

THURSDAY, SEPTEMBER 9, 1982

House of Representatives,
Committee on Small Business,
Subcommittee on Antitrust and Restraint
of Trade Activities Affecting Small Business,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:47 a.m., in room 2359-A, Rayburn House Office Building, Hon. Thomas A. Luken (chairman of the subcommittee) presiding.

OPENING STATEMENT OF CHAIRMAN LUKEN

Mr. Luken. My apologies to the members of the committee and those in attendance for the tardy beginning of this session.

This is a hearing conducted by the Subcommittee on Antitrust and Restraint of Trade Activities Affecting Small Business. I call to order this session of the committee because today the subcommittee will be examining the impact of Federal antitrust enforcement policies on small business. We are going to be focusing on the Robinson-Patman Act, and the laws governing vertical trade restraints particularly. To this end we will be hearing from officials of the Department of Justice and the Federal Trade Commission, academics, and representatives of the small business community.

While the area of antitrust law has always triggered vocal debate, recent statements by opponents of the laws and their enforcement has caused widespread concern throughout Congress and throughout the business community, especially the small business community.

When the Nation's top antitrust law enforcement official has described the Robinson-Patman Act as a "dreadful piece of legislation,[1] full of absurdities," [2] and an "unjustified protection for small business from the rigors of competition," [3] and has apparently acted upon the basis of that statement, then there is real cause for concern and investigation by the subcommittee.

The Chairman of the FTC has described circumstances where he believes price discrimination "deserves applause rather than prohibition." [4]

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[1] Dun's Review, August 1981.
[2] American Lawyer, July 1981.
[3] New York Times, April 26, 1981.
[4] Speech by James Miller, Tokyo, Japan, Aug. 23, 1982.

Further, Federal officials have turned their backs on the laws governing resale price maintenance. Mr. Baxter has stated that:

> The disagreement is not about the present state of the law so much as whether the law really makes sense. The Supreme Court has said on a variety of occasions that vertical price fixing is, per se, illegal. Yet it is the position of the Antitrust Division that [this practice] should not be illegal per se in view of certain competitive principles." [5]

It appears from their public statements that these officials have disregarded the clear legislative history surrounding our antitrust laws.

Judge Learned Hand noted that one of the purposes of the antitrust statutes "* * * was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." [6]

The purpose of the law is as valid today as when our predecessors were enacting the Sherman, Clayton, and Robinson-Patman Acts. It is well known that small business makes important vital contributions to our society and to the economy. They are the leaders in innovation and job creation. Because of this special role, any change in policy which has a potential impact upon this vital segment of our economy should be carefully scrutinized.

Mr. LUKEN. At this time I would like to call upon Congressman Berkley Bedell, the gentleman from Iowa, for any statement he may have, and to acknowledge his role in inspiring this hearing and acknowledge his leadership as the chairman of this subcommittee in previous Congresses.

Mr. Bedell.

OPENING STATEMENT OF HON. BERKLEY BEDELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IOWA

Mr. BEDELL. Thank you, Mr. Chairman.

First of all, I should alert the committee to the fact that I have some 150 mayors, councilmen, supervisors and others from my district in here today for a community conference, so it is going to be difficult for me to be at these hearings as much as I would like to be.

I think the chairman has put his finger upon the real issue that we face here today, which I believe is about as important an issue as we could discuss. That issue is whether or not the Government is going to operate in the manner in which our forefathers originally intended it to operate, which was that the Congress would enact the laws, to be signed or vetoed by the President, and be administered by the executive branch of the Government.

It appears quite clear that we face at this time a case where Congress has enacted laws, they have been signed by the President, where the Justice Department and others in the administration think that those laws are improper and wrong. The proper way to correct laws that are wrong is for them to go to the President or come to the Congress and have them changed. It certainly is not proper for them, simply because they disagree with what Congress may have done, to decide that they are going to not enforce the laws that have been passed by the Congress.

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[5] Washington Post, Aug. 13, 1982.

[6] Hand, J., *U.S.* v. *Aluminum Co. of America*, 148 F. 2d 416, 429.

I believe that is the issue we face today. I think it is important that it should be brought up. I think it is much more important as a basic issue than simply whether or not this particular case is going to be prosecuted or ignored. I think the real issue here is whether or not we are going to expect Government to operate as it is supposed to operate, or whether we are going to give people within the administration the opportunity to simply flaunt the will of the Congress, flaunt the laws that are made, and say that "because we think the laws are wrong, we are going to ignore them or will not enforce them as we are charged to do."

Mr. LUKEN. Mr. Daub.

OPENING STATEMENT OF HON. HAL DAUB, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEBRASKA

Mr. DAUB. Mr. Chairman, I want to commend you for holding this hearing today, and tell you that from our side of the aisle we appreciate your leadership.

Today's hearings are a welcome response by this committee to a problem that is not new but requires continual reexamination. The history of antitrust actions is an inconsistent one, regardless of the vigor with which the laws have been enforced. One reason for this is that it is extremely difficult to predict the result of certain mergers that take place as well as those that do not take place.

Our responsibility in this committee is to assess the antitrust functions of Government so as to assess their impact on the small business community. This is a very important task because, as I have said before, the voice of the small business community is often unheard amid the much larger and cohesive voices of other groups. But because small business is the bulwark of our economy, this Congress ignores at its peril the consequences that would result were the small business community to find itself increasingly the victim of the predatory practices of larger companies whose aim is not so much to compete in the marketplace as it is to drive out competitors at whatever cost.

I am confident that the witnesses that we have here today will do much to enlighten this committee and this Congress as to the conditions that prevail today. We need to continue to seek out answers to problems that are constantly changing. We need to reacquaint ourselves with the circumstances that small businesses find themselves in today, and we need to answer these challenges in whatever manner is necessary to assure small business that the Government is upholding its responsibilities to insure fair competition under the law.

Thank you, Mr. Chairman.

Mr. LUKEN. Thank you, Mr. Daub. That was a very excellent statement.

I think these statements are the proper setting from which we can launch this hearing today and possible subsequent hearings since the subject is one of such depth and such complexity and one which is evolving with the developments and the statements and attitudes that are being expressed by the officials within the Government who are entrusted with carrying out the enforcement of these laws, that it is very likely this will not be the final chapter as far as this subcommittee is concerned, either in this Congress or in subsequent Congresses. I think we may well be compelled to continue this investigation; the circumstances will dictate it.

Without objection, we will enter in the record the statement of our colleague, Mr. Henry Gonzalez, who is unable to be here.

[Mr. Gonzalez' prepared statement follows:]

PREPARED STATEMENT OF HON. HENRY B. GONZALEZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Thank you, Mr. Chairman, for this opportunity for me to make this statement for the record of this hearing. First, I wish to compliment you and applaud you for your decision to hold this hearing on this important subject at this time.

It is especially important and in the interest of small business that this record be made concerning the record of the enforcement of the Robinson-Patman Act and other related antitrust laws. It is also important to and in the interest of small business and, indeed, the public generally, for us to air and make a record of the attitudes, positions, and policies of public officials toward these laws when it is their duty and in the public interest to enforce the laws as enacted and entrusted to them to enforce.

Mr. Chairman, it has been reported that Assistant Attorney General William Baxter whose duty as the Chief of the Antitrust Division of the United States Department of Justice to enforce these laws has stated since he assumed that office that he does not favor the Robinson-Patman Antitrust Law and would favor its repeal but would not be urging its repeal because such move would face bitter opposition from small business and that he would not therefore consider a move for repeal worth the effort in the face of such opposition. Also it is reported that since he assumed office in January 1981, he has not moved to enforce that particular antitrust law at all. Moreover, it is reported that within recent days the newly appointed Chairman of the Federal Trade Commission, James C. Miller III, in a public speech disclosed his attitude regarding the problem of price discrimination and the Robinson-Patman Antitrust Law wherein it is reported that he said:

"Price discrimination which is merely episodic, however, may well represent a first step in the breakdown of rigid or collusive pricing, or a device for entering a new market at efficient scale, and deserve applause rather than prohibition."

Mr. Miller has not supplied his definition and interpretation of "episodic" as there used. Some years past the House Small Committee and the Federal Trade Commission gave their attention to an episode in which one large national firm moved to break into the market of selling jams, jellies, and preserves in the Middle-Atlantic states. When that move was made, hundreds of small independent producers and sellers of jams, jellies, and preserves were doing business in the area from New Jersey to Georgia. Many of those had small shops and small organizations but good reputations and were making sales to chains of retailers of food. The national firm to which I made reference said that in order to break into the market, it was going to make an introductory offer to its larger customers by selling them for a period of sixty days two cases of jams, jellies, and preserves for the price of one. In other words at half price. The buyers for those large chains knew that cost of producing such products and knew that their net costs in making such purchases in such offers would be at below the cost of production. Consequently, they moved to load up their warehouses during that episode of sixty days. As a further consequence, other sellers of jams, jellies, and preserves in the territory practically had little or no market left to them for the period of the next year. Would that be an episodic price discrimination in the eyes of Mr. Miller? The representatives of small business know of many, many other such problems and would like to know from Mr. Miller how he would interpret their problems regarding price discrimination. Perhaps these hearings will help us make a determination of what some of these attitudes, positions, and policies of our officials happen to be.

Mr. Chairman, with respect to the reported attitudes, position, policies, and records of such public officials it seems they they are somewhat similar to those which were experienced in years past when I was designated as Chairman of Ad Hoc Subcommittee on Antitrust and The Robinson-Patman Act and Related Matters of the House Small Business Committee in 1975. In order to clarify what I am referring to, I would like to repeat here what I had to say on that occasion. On September 24, 1975, Hon. Joe L. Evins, chairman of the Committee on Small Business, announced the establishment of a special Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act and Related Matters. The subcommittee was directed to look into various antitrust matters, including those involing the Robinson-Patman Act and its enforcement as such matters affect small business. In making his announcement, Chairman Evins stated:

"This special Subcommittee was established as a result of widespread concern regarding alleged efforts to repeal or weaken the Robinson-Patman Act and because of the impact of the growth of giantism and anticompetitive pressures on this Nation's 9½ million small businessmen.

"The Robinson-Patman Act, known as the "Magna Carta of small business," is vital and important to assure small businessmen of needed protection in the marketplace in such areas as volume sales by large manufacturers. For example, this Act prohibits discrimination on discounts in sales and in advertising allowances to small business.

"This landmark Act should be retained, continued and enforced."

The widely reported efforts on the part of some officials of the Antitrust Division of the Department of Justice to urge and persuade others to support their views to amend or repeal the Robinson-Patman Act have result in a very strong and negative response from representatives of small business who have not only expressed their deep concern, but also their own alarm that as important law—The Robinson-Patman Act—is again under severe attack. The press reported the reaction of organizations of small businessmen.

Attention was invited to the recorded facts that the Robinson-Patman Act was enacted as a bipartisan law and as a nonpartisan measure and was supported by both Democrats and Republicans. In fact, it passed the Congress with practically on opposition.

Under the Rules of the U.S. House of Representatives, the Committee on Small Business has "* * * the function of studying and investigating, on a continuing basis, the problems of all types of small business." In pursuance of that duty and in light of the fact that the committee received communications from Members of the House regarding their respective constituents' fears that a law for such constituents' economic protection is threatened by powerfull forces,

I deemed it helpful to reiterate the clearly expressed policy of the Congress as stated in the United States Code, title 15, section 631, which is in part, as follows:

"It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small business concerns."

Prior to the date of the first hearing by our Subcommittee in 1975, the subcommittee directed letters regarding a recent effort to amend or repeal the Robinson-Patman Act to the Honorable Thomas E. Kauper, Assistant Attorney General; and the Honorable Harold R. Tyler, Jr., Deputy Attorney General, U.S. Department of Justice. It was strange indeed that these officials of an important Government agency did not see fit to extend the courtesy of an acknowledgment or a reply, notwithstanding the fact that a month and a half elapsed.

Now what did we ask of those officials in those letters of October 2, 1975? In order to demonstrate clearly the answer to that question, I include here the text of each of those two letters:

COMMITTEE ON SMALL BUSINESS,
U.S. HOUSE OF REPRESENTATIVES,
October 2, 1975.

Hon. THOMAS E. KAUPER,
Assistant Attorney General,
U.S. Department of Justice, Washington, D.C.

DEAR MR. KAUPER: Transmitted herewith is a duplicate original of a letter which this day has been directed to the Honorable Harold R. Tyler, Jr., Deputy Attorney General of the United States.

Also, it has been reported that you, in your official capacity, have made statements of fact to the same effect concerning this same subject as the quoted statement attributed to Deputy Attorney General Tyler as set forth in the enclosed letter.

In view of these circumstances, you are requested to submit to this Committee, promptly, the factual evidence you had supporting the statements you have made to which above reference is made. It is emphasized that this request is not for information in the form of statements of philosophy, beliefs, opinions, conclusions or arguments which possibly have been made concerning the propriety of the Robinson-Patman Act as a part of the Federal antitrust laws.

Thanking you in advance for your prompt attention and compliance with this request, I am,

Sincerely yours,

Henry B. Gonzalez,
Chairman, Ad Hoc Subcommittee on Antitrust,
the Robinson-Patman Act, and Related Matters.

Committee on Small Business,
U.S. House of Representatives,
October 2, 1975.

Hon. Harold R. Tyler, Jr.,
Deputy Attorney General of the United States, Department of Justice, Washington, D.C.

Dear Mr. Tyler: This Committee has determined to commence an investigation, hearings and a review of a number of questions concerning the Robinson-Patman Act and its relation to small business.

As you know, the House Small Business Committee for years has regarded the Robinson-Patman Act as a vital factor in aiding, counseling and assisting small business in order through that means to aid in the preservation of our free, competitive enterprise. That view has been held because it has been considered to be not only consistent with, but also in furtherance of the national declared policy set forth in the Small Business Act approved by President Eisenhower on July 18, 1958, a pertinent portion of which is quoted as follows:

"The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiatives and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of the Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise." (15 USC 631)

You are advised that in connection with our preparations for investigations and further review of the above subject, it has been noted that you announced your office is preparing a report concerning the Robinson-Patman Act which may contain recommendations for a repeal of the Act. Also, it is reported that in that connection, you asserted as a fact in a public address to the Antitrust Section of the American Bar Association a few weeks ago, "That Act clearly discourages price competition." Assertions of fact to that effect concern this Committee because among other things we have no evidence which would seem to establish such a fact.

In view of these circumstances, if the report to which reference is made is accurate of your assertion of those facts, you are requested to submit to this Committee promptly, the factual evidence you had supporting the above quoted statement. It is emphasized that this request is not for information in the form of statements of philosophy, beliefs, opinions, conclusions or arguments which possibly have been made concerning the propriety of the Robinson-Patman Act as a part of the Federal antitrust laws.

Thanking you in advance for your prompt attention and compliance with this request, I am

Sincerely yours,

Henry B. Gonzalez,
Chairman, Ad Hoc Subcommittee on Antitrust,
the Robinson-Patman Act, and Related Matters.

Almost two months later officials of the Antitrust Division of the United States Department of Justice, Mr. Kauper and his Deputy Mr. Joe Sims, appeared as witnesses before the House Small Business Committee to testify. They provided an answer to the question raised by those letters. That answer is here quoted in the form of questions and answers from the record of the hearing of that date as follows:

"Mr. MacIntyre. Mr. Sims, I am going to ask the clerk to hand you a couple of documents. I want to ask you if you recognize them as reports you have seen. The first of those two there are stapled together and purport to be a few pages from the BNA News and Comment, Antitrust Regulation, July 22, 1975; and the second, pages from the same document, September 30, 1975. You have seen those reports previously, have you not?

"Mr. SIMS. I recall seeing them, yes.

"Mr. MACINTYRE. Do they rather correctly reflect what they purport to reflect?

"Mr. SIMS. I believe the first of the two documents is a report or a paraphrased summary of my testimony. As I recall that, that seems to be relatively accurate. The second of the two documents . . .

"Mr. MACINTYRE. It is a report on an interview.

"Mr. SIMS. The second of the two documents is based—at least in part—on a discussion I had with a reporter for the ATRR publication.

"Mr. MACINTYRE. Did he accurately report that interview?

"Mr. SIMS. As I recall reading it, it seems to me it was, on an overall basis, accurate. I would have to look at all the precise quotations to make sure that it is accurate now, based on what I remember. But I assume it is.

"Mr. MACINTYRE. Shortly after it came out, you raised no objection to the report?

"Mr. SIMS. I would assume the report is accurate. I have no reason to believe otherwise.

"Mr. GONZALEZ. If the Counsel will allow, while we are on Bureau of National Affairs interview, it says right there on the first page of this report:

" 'Sims explained that Justice has never been a strong supporter of Robinson-Patman. President Ford also has called for a revision of the act. Complete repeal of Robinson-Patman Act is an appealing option to some Justice officials, according to Sims, who added that many people say existing statutes could provide adequate protection against predatory practices. He said Justice and the administration have not selected an option yet. Holding public hearings to gage sentiment about reforming the act is the possibility under serious consideration, Sims said. In an interview with BNA, Sims said the Justice Department arguments against Robinson-Patman are largely based on logic, "anecdotal information and philosophic bias." ' "

Consequently, Mr. Chairman, as we saw then and as we suspect the case to be today, these public officials charged with the enforcement of the Robinson-Patman Antitrust Law do not favor its enforcement, but instead favor its repeal not on the basis of any evidentiary, factual evidence that the law is as harmful as they claim merely because they have arrived at their conclusions principally, if not entirely, on the basis of "anecdotal information and philosophic bias." Well, Mr. Chairman, I must say that if we've come to the point where we must rely upon public officials to enforce our antitrust laws who have a philosophic bias against the purposes and the provisions of such laws, then we have indeed reached a low point in our law enforcement. If this hearing develops the facts showing such deplorable situations, then it will have well served our people.

Finally, in conclusion, Mr. Chairman, I have here included and made a part of this opening statement of mine the findings and conclusion, and recommendations from House Report No. 94-1738, pages 121-123 as a report of the Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act and Related Matters of the Committee on Small Business, United States House of Representatives, September 30, 1976. Those findings, conclusions, and recommendations were as follows:

"CHAPTER XIV. FINDINGS AND CONCLUSIONS

"The Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act, and Related Matters of the Committee on Small Business, House of Representatives, finds and concludes that:

"1. The Robinson-Patman Act, which is an important part of the antitrust laws of the United States, should not be repealed nor emasculated nor weakened in any way whatsoever; neither should it be amended. However, in order to provide additional leverage in furtherance of the beneficient purposes of this time-proven law, Section 3 of the Robinson-Patman Act should, by Congressional action, be included within the term 'antitrust laws.'

"2. The Robinson-Patman Act has implemented the clearly expressed national public policy '* * * that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small business concerns in order to preserve free competitive enterprise * * *.' Therefore, the Robinson-Patman Act must be effectively enforced by those governmental agencies which are charged with the duty to execute and enforce its provisions.

"3. 'Regulation,' as that term is normally used by this and other congressional committees, means supervisory control by an administrative body that substitutes for the impersonal control of the free market. In that sense, neither the Robinson-Patman Act nor other provisions of law making it illegal to use price discriminatory acts or practices are regulations of business. The antitrust laws, of which the Robinson-Patman Act is an integral part, do not require the promulgation of regulations to control business activities. The antitrust statutes merely require that business avoid such acts and practices which restrain, injure, damage, or destroy small business through price discriminatory practices or tend to create a monopoly. The provisions of the Robinson-Patman Act call for no paperwork on the part of businessmen who comply with the spirit and intent of the law. Calling one thing or law by a different name cannot possibly change the true character of that thing or statute.

"4. It appears that certain special interests who oppose the antitrust laws, including the Robinson-Patman Act, have mounted strong and vigorous campaigns, including lobbying activities and making erroneous charges to the effect that the Robinson-Patman Act impedes competition. Such activities and allegations were made by these special interests and others in their efforts to weaken or repeal the Robinson-Patman Act which together with the other antitrust laws are, in fact, a basis for economic freedom of Americans. Therefore, vigilance is needed and prompt action required to oppose these special interest groups and other individuals who would like to emasculate or even do away with such needed laws.

"5. The unfounded, erroneous and unjustified allegations made against the antitrust laws in general, and against the Robinson-Patman Act specificially, have had the ill effects of confusing citizens and governmental officials and misleading them into the belief that those laws against price discrimination practices destructive of competition are anticompetitive and undesirable and should be repealed.

"6. The lobbying activities and unjustified allegations made against the Robinson-Patman Act had the further unfortunate effect of persuading or leading some public officials who are charged with the duty, responsibility, and obligation to enforce this law, to refrain from its full and complete enforcement with the result that the Congressional intent is thwarted and a bureaucratic repeal effected. The Ad Hoc Subcommittee condemns such lobbying activities on the part of special interest groups as well as others so lobbying.

"CHAPTER XV. RECOMMENDATIONS

"The Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act, and Related Matters of the Committee on Small Business, House of Representatives, makes its recommendations based on its investigations, the testimony heard, and other evidence presented to and developed at its hearings regarding "Recent Efforts to Amend or Repeal the Robinson-Patman Act." These recommendations are as follows:

"A. To the Executive Branch of the Government:

"(1) That neither it nor any of its Departments consider nor take any action on proposals to weaken, emasculate, or repeal the Robinson-Patman Act or other provisions of Federal laws against price discrimination practices which may injure, lessen, or destroy competition.

"(2) That it, through its appropriate Departments and agencies, fully and effectively enforce the Robinson-Patman Act and all antitrust laws and other statutes to aid and assist the small business sector of the American economy, and thereby comply with the express mandate of the Congress.

"B. To the independent and administrative agencies:

"That every independent administrative or regulatory agency of the Government which is charged with the duty to enforce the Robinson-Patman Act, and other statutes and laws designed to preserve the free enterprise system and to keep small business as a viable and essential element of American society, should completely and fully administer and enforce all the provisions of the United States Code over which each such agency has jurisdiction.

"C. To the Congress of the United States:

"(1) That the Senate, the House of Representatives, and their respective committees should not consider favorably nor take any action on proposals or legislative measures to weaken, emasculate, or repeal the Robinson-Patman Act or other provisions of the Federal laws against price discrimination practices which may injure, lessen or destroy competition.

"(2) That the appropriate legislative committees consider amending section 12 of title 15 of the United States Code in order that section 3 of the Robinson-Patman Act (15 U.S.C. 13a) be included within the definition of the term "antitrust laws."

"(3) That the House Small Business Committee, the Senate Small Business Committee, the House Judiciary Committee, and the Senate Judiciary Committee consider establishing and maintaining liaison and consultations jointly, through their respective professional staffs, for the purpose of reporting antitrust matters, including Robinson-Patman Act involvement, and the enforcement of laws when such matters or statutes may have an impact upon small business, giving due regard to the National public policy as stated in the Small Business Act as codified in 15 U.S.C. 631."

Mr. Chairman, I ask that this my opening statement including all parts thereof be made a part of the record of this hearing. Also, I request and move that there be included in the record of this hearing, by reference, the record that we made on this subject in our hearings before the House Small Business Committee in 1975-76 and upon which House Report No. 94-1738 was based.

Mr. LUKEN. We will now call the first witness, Mr. Jared Blum, on behalf of the Small Business Legislative Council.

TESTIMONY OF JARED O. BLUM, VICE CHAIRMAN, SMALL BUSINESS LEGISLATIVE COUNCIL; ACCOMPANIED BY RANDOLPH SEIFERT, NATIONAL ASSOCIATION OF THE REMODELING INDUSTRY, AND MEMBER, ANTITRUST COMMITTEE, SBLC

Mr. BLUM. Thank you, Mr. Chairman.

Mr. LUKEN. We have your testimony, which will be, without objection, received into the record. You may summarize it or read it as you see fit.

I am not just addressing this to you, but we do have a number of witnesses, so we would like to move along, and if you could summarize it and tell us what you would like to highlight. I have personally read it and I am sure the other members have. You may proceed in whatever fashion you see fit.

Mr. BLUM. Thank you, Mr. Chairman. I have, indeed, prepared a summary, so I should be briefer than my complete testimony.

My name is Jared Blum. I am vice chairman of the Small Business Legislative Council and chairman of its Antitrust Committee. I am also vice president and counsel of the Direct Selling Association.

With me today is Randolph Seifert, who is with the National Association of Remodeling Industries. He is also a member of our Antitrust Committee.

One of the purposes of these hearings is to examine the state of Government antitrust enforcement now that the programs of the administration's Antitrust Chief at the Department of Justice and the policies of the FTC's Chairman have taken shape and, to some extent, are being implemented through specific action. We believe it is vital that an examination be conducted at this time.

The small business community is distressed that within the Government those who have voluntarily assumed responsibility for enforcing our antitrust laws instead persistently seek to substitute their view of what the law should be instead of what the law is. When Assistant Attorney General Baxter and Chairman Miller were confirmed by Congress, they agreed to enforce the laws. These hearings are quite appropriate and SBLC is especially pleased to take this opportunity to be here.

Small business continues to bear the brunt, as you all know, of a severely sluggish economy. The President, in his State of Small Business Report issued in March, recognized the plight of small business in today's economy; but he also expects that small business will significantly influence the Nation's economic recovery. His message applauds the contributions small business makes to the creation of new jobs and to competition. The success of the American economy is critically dependent upon the preservation of real opportunity for small business. Thus, he called upon the Justice Department to use its antitrust enforcement powers consistently and without hesitation to the extent that Federal antitrust enforcement can influence competition. I stress that: To the extent that Federal antitrust enforcement can influence competition. Yet, we do not believe this has been the case.

The support for a continued existence of a viable and growing small business segment of our economy is not based on sentiment, a longing for the good old days of the one-man or one-wife shop. Over the decades, public policy pronouncements and actions that are hospitable in intent by Congress and various administrations have been based on sound and the most practical public policy considerations.

We are distressed that these values that were enunciated by the Congress, year in and year out, do not seem to have a place in the antitrust enforcement policies today. Indeed, Assistant Attorney General Baxter seems quite insensitive to the role of small business in the formulation of antitrust policy.

In an interview reported in the August 3, 1981 issue of U.S. News & World Report, Mr. Baxter was asked the following question: "Do small firms have anything to fear from this administration's enforcement of the antitrust laws?" Mr. Baxter's answer was as follows: "To the extent we succeed in enhancing the efficiency of some industries by administering a more coherent, economically based, efficiency-oriented version of antitrust, price levels will fall and some small enterprises will probably be squeezed out of those markets."

Mr. Baxter has referred to the Robinson-Patman Act, as you stated in your opening statement, Mr. Chairman, as full of absurdities, and as an unjustified protection for small business from the rigors of competition. Indeed, according to a very recent article in the Washington Post, Mr. Baxter would even permit illegal resale price fixing because, in his view, the present law on the subject does not make sense.

The timing of this hearing is quite fortuitous, and this issue is bipartisan in nature. I call to your attention the hearing on the Senate side today, being chaired by Senator Rudman, a former attorney general in the State of New Hampshire, and Senator Slade Gordon, another former attorney general, has also indicated great interest. These former attorneys general are very concerned about the failure to enforce the law.

The current antitrust philosophy notwithstanding, it is a fact that the role of small business in our free enterprise system is simply not a matter which may be dealt with at the discretion of an administration. Congress has enacted laws that have required public policy to take notice of small business interests.

I refer the committee to section 2(a) of the Small Business Act, 15 U.S.C. section 631. Without reading the whole section, I would merely summarize that the Congress indicated in that directive that policies of the Government shall be implemented, taking into consideration the interests and viability of small business.

It follows, therefore, that antitrust enforcement policy does not, as economists might have us believe, exist in a vacuum, but should also reflect the above-mentioned national policy. It is a truism that small business relies on vigorous enforcement of the antitrust laws. This is so because the antitrust laws were enacted in recognition of small business as economic challenger. Antitrust was then, and is now, a means for assuring the survival of small business as a competitive factor in the economy.

With the above as background, let me examine briefly several issues before the committee.

The long awaited Department of Justice merger guidelines and the Federal Trade Commission statement on horizontal mergers have just been issued. Generally speaking, the SPLC does not have any quarrel with either the guidelines or the FTC statement on mergers. However, we find they should not be used as a stepping stone for changing existing laws.

Consider next the Robinson-Patman Act. There is no antitrust law more strongly supported by the small business community than this antidiscrimination law. The Department of Justice simply ignores this basic statute, which is contained in section 2 of the Clayton Act. The FTC's Bureau of Competition, on the other hand, from time to time has been quite diligent in its enforcement.

It is clear that the Justice Department's antitrust lawyers know that price and other forms of discrimination are a favorite and frequently employed tool of the monopolist or the would-be monopolist. Why do they not enforce the law?

In accordance with an informal interagency agreement, the Federal Trade Commission, therefore, has assumed the responsibility of bringing Government claims under R-P. I am attaching to this testimony, and I ask that it be made a part of the record, data compiled by Anthony Robinson, senior economist, Office of Economic Research at the U.S. Small Business Administration, on the number of antitrust cases commenced by the Government, focusing on enforcement of the Robinson-Patman Act through June, 1981. It is plain that since 1975 the number of Robinson-Patman cases brought is insignificant.

I might say at this point that though we at the SBLC may disagree with Chairman Miller at the FTC on some issues, including Robinson-Patman, we applaud his continued statements of his intent to enforce the law, and also his ongoing and quite successful outreach program to the small business community to determine what our needs and concerns are. We do take issue with a recent statement by the Chairman that he made to the Japan Federation of Economic Organizations, that he would prosecute only persistent price discrimination conduct cases. Under this theory, the bodies will have to be in plain sight and strewn throughout the landscape before the Commission would bring a Robinson-Patman case. The law is quite clear, that episodic price discrimination is also illegal.

Let us turn finally to the area of vertical restraints. On October 30, 1981, Ronald Carr, Deputy Assistant Attorney General of the Antitrust Division, told the Ohio State Bar Association that vertical restraints, in the Division's scheme of things, should be placed somewhere down the enforcement line, "possibly to the point of vanishing." Further, Mr. Carr viewed resale price maintenance, which is, per se, illegal as having some beneficial effect. Indeed, this committee has already commented on Mr. Baxter's comments in the Washington Post. We can debate the merits or disadvantages of allowing manufacturers to fix prices with their retailers. Indeed, it may well be folly to accept the economic idea of efficiency as paramount, a value to which all others are subordinate. But one thing beyond debate is that today resale price maintenance is per se illegal.

We began this testimony by commenting that there appears to be a determined effort to reverse some 90 years of tradition of antitrust enforcement. We can think of no better example of this effort and of no legitimate excuse for the Government's refusal to enforce the law as it now exists.

An analogous situation may be of a district attorney in a county who disagrees philosophically with drug enforcement and decides not to prosecute cocaine and heroin dealers.

In conclusion, may I say that the proposals that have been coming from the Department of Justice primarily, and the FTC secondarily, are of a grave concern to the small business community, and SBLC specifically. I applaud this committee's interest in this issue and I look forward to working with you on the issue in the years ahead.

[Mr. Blum's prepared statement follows:]

PREPARED STATEMENT OF JARED O. BLUM, VICE CHAIRMAN, SMALL BUSINESS LEGISLATIVE COUNCIL

This statement is submitted on behalf of the Small Business Legislative Council (SBLC), an organization of some seventy-four national business and trade associations. Our members represent approximately 4.5 million small business units covering almost the full range of SIC classifications.

My name is Jared O. Blum. I am the Vice Chairman of SBLC and the Chairman of its Antitrust Committee. I also am Vice President and General Counsel of the Direct Selling Association.

One purpose of these hearings is to examine the state of Government antitrust enforcement now that the programs of the administration's Antitrust Chief at the Department of Justice and the policies of the Chairman of the Federal Trade Commission have taken shape and are, to some extent, being implemented through specific action. The SBLC is honored to represent the views of small business on the relationship between the values reflected in our federal antitrust laws and small business and has been privileged to do so many times before the Congress. We believe it is vital that such an examination be conducted at this time. Proud that our views are well known, we are confident of their acceptance by those, like the members of your Committee, who are the guardians of values we seem to preserve. But we are distressed that within the Government those who have voluntarily assumed responsibility for enforcing our antitrust laws instead persistently seek to substitute their view of what the law should be for what the law is. When Assistant Attorney General Baxter and Chairman Miller and their chief deputies were confirmed by Congress, they agreed to do no less than to enforce the laws and policies now in place. These hearings are quite appropriate, therefore, and the SBLC is especially pleased to take this opportunity to testify on this timely subject.

It is quite plain that the views of small business have failen on deaf ears within the Government's antitrust enforcement program, particularly in the Department of Justice. Small business continues to bear the brunt of a severely sluggish economy. President Reagan, in his State of Small Business Report, issued on March 1, 1982, recognized the plight of small business in today's economy; but he also expects that small business will significantly influence the nation's economic recovery.[1] His message applauds the contributions small business makes to the creation of new jobs (two out of every three), to innovation (twice as many per employee), and to competition. The success of the American economy is "critically dependent" upon the preservation of real opportunity for small business, stated the President.[2] Thus, he called on the Justice Department to use its antitrust enforcement powers consistently and without hesitation "to the extent that federal antitrust enforcement can influence competition." [3] Yet—and we do not believe we understate the situation—we are witnessing today determined efforts to reverse and effectively gut ninety years of antitrust enforcement tradition. Such efforts constitute grave and very real threats to small business and to the country.

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[1] "The State of Small Business: A Report of the President," March 1982, at 5.

The vitality of small firms and of the small business sector is threatened by the relentless and sophisticated accumulation of power and wealth by the bigs, as it has been at no other time in our history. The President's Report includes these rather sobering statistics. Although 99 percent of the approximately 15,000,000 businesses identified by the President employ 500 employees or less, in 1977 small businesses accounted for only 38 percent of the gross national product. Twenty years earlier, small business' share was approximately 48 percent. Almost half of this 10 percent decline (4.7 percent) accrued during the last five years of this period (1972–1977). At the same time, the employment share of companies with under 500 employees was only two percentage points lower in 1977 than it was in 1958, 55.2 percent versus 52.5 percent. Thus, big business has been able to significantly increase its GNP share using relatively fewer employees.

The support for a continued existence of a viable and growing small business segment of our economy is not at all based on sentiment, a longing for the good old days of the one man or one man and wife enterprise. Over the decades, public policy pronouncements and actions that are hospitable in intent by Congress and various administrations have been based on sound and most practical public policy considerations. Chief among these is the recognition that it is the smalls, not the bigs, that lead in the creation of new jobs. It is the smalls, not the bigs, that lead in innovations. And it is the small business unit upon which we must rely to provide the essential element of competition so as to protect all of us against the abuses of monopoly power, the deliberate limiting of production to sustain ever higher prices, the divisions of markets or end customers, and even price fixing.

We are distressed that these values do not seem to have a place in the Government's antitrust program today. Indeed, Assistant Attorney General Baxter, for one, seems quite insensitive to the role small business must play in the formulation of antitrust policy. In an interview reported in the August 3, 1981 issue of U.S. News and World Report, Mr. Baxter was asked the following question: "Do small firms have anything to fear from this Administration's enforcement of the antitrust laws?" Mr. Baxter's answer was as follows: "To the extent we succeed in enhancing the efficiency of some industries by administering a more coherent, economically based, efficiency-oriented version of antitrust, price levels will fall, and some small enterprises will probably be squeezed out of those markets." Mr. Baxter has referred to the Robinson-Patman Act as full of "absurdities" (American Lawyer, July 1981), and as an "unjustified protection for small business from the rigors of competition." (New York Times, April 26, 1981.) Now, according to an article appearing in the August 13, 1982 Washington Post, Mr. Baxter would even permit illegal resale price fixing because, in his view, the present law on the subject does not make sense.

The timing of this hearing is fortuitous, given recent developments in the antitrust area, and indeed the concerns about antitrust enforcement are bipartisan. This hearing, and that being chaired by Senator Rudman, a former New Hampshire Attorney General, indicate that the breadth of concern of this issue is crossing political boundaries and goes to the issue of whether our laws are being enforced.

The current antitrust philosophy notwithstanding, it is a fact that the role of small business in our free enterprise system is simply not a matter which may be dealt with at the discretion of the Administration. With all due respect, we submit that enforcement policy cannot ignore or give short shrift to small business. We refer, for example, to house Report No. 94-1738, entitled "A Report of the Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act, and Related Matters of the Committee on Small Business, House of Representatives," issued September 30, 1976. The Committee Report emphatically reaffirms a national policy which requires that small business concerns be integrated into Government action, and, indeed, that these concerns be treated as matters of primary importance. Citing Section 2(a) of the Small Business Act, 15 U.S.C. § 631(a), the Subcommittee states:

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[2] Id. at 3.
[3] Id. at 16.

The Congress has clearly expressed its intent and policy respecting small business in the following language:

"The essense of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well being, but to the security of this Nation. Such security and well-being cannot be realized unless the actual and potential of small business is encouraged and deveoped. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation."

In the Small Business Act, quoted above, the public policy of the United States is unequivocably declared. (Report, supra, at 10.)

If follows, therefore that antitrust enforcement policy does not, as economists might have us believe, exist in a vacuum, but should also reflect the above-mentioned national policy. It is a truism that small business relies on vigorous enforcement of the antitrust laws. This is so because the antitrust laws were enacted in recognition of small business as economic challenger. Antitrust was then, and is now, a means for assuring the survival of the small business sector—a large number of firms that can check the monopolistic tendencies of companies grown large enough to exercise some degree of control over their markets.

With the above as background, let us examine briefly how the Administration has thus far carried out its mandate to enforce the law. First, in the area of mergers.

The long awaited Department of Justice (revised) Merger Guidelines and parallel Federal Trade Commission Statement on Horizontal Mergers have only just been issued. The SBLC welcomes the Government's new merger criteria. Uncertainty about Government enforcement standards and a desire to formulate a more specific market share analysis apparently led to the new guidelines.[4] However, while we find the guidelines generally acceptable, they should not be used as a stepping stone to rewrite the laws on mergers.

Chairman Miller, for example, recently noted that the new merger guidelines of both his agency and that of Assistant Attorney General Baxter would create "a zone of 'presumptive legality' [which] may encourage the consumation of mergers having positive effects upon efficiency and competition . . . that otherwise would not be attempted because of fear of governmental intervention."[5] However, under Section 7 of the Clayton Act it is not a defense to an otherwise illegal combination that the new combination would result in certain economic efficiencies. The Supreme Court has held repeatedly that efficiency cannot justify a merger. See, e.g., *Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962); *United States* v. *Philadelphia National Bank,* 374 U.S. 321 (1963); *FTC* v. *Procter & Gamble Co.,* 386 U.S. 568 (1967). We hasten to note that on this issue Chairman Miller recognizes that he departs company on this issue with his fellow Commissioners, who agree that the issue of efficiencies cannot be treated as a legally cognizable defense.[6]

Consider next the Robinson-Patman Act. There is no antitrust law more strongly supported by the small business community than this anti-discrimination law. The Department of Justice simply ignores this basic statute, which is contained in Section 2 of the Clayton Act; the FTC's Bureau of Competition, on the other hand, from time to time has been quite diligent in its enforcement. Small business knows too well that lacking Government efforts, this law will be honored more in the breach than in the observance. This is a problem area of basic, immediate and vital concern to our entire small business constituency.

It is clear that the Justice Department's antitrust lawyers know that price and other forms of discrimination are a favorite and frequently employed tool of the monopolist, or the would-be monopolist. In the leading monopoly cases brought by the Justice Department, price discrimination as well as predatory pricing have played a prominent role. But in recent years, the Department's antipathy for Robinson-

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[4] See the Statement of the Attorney General and the FTC Statement on Horizontal Mergers, June 14, 1982, reprinted in 42 Antitrust & Trade Reg. Rep. (BNA) at S-11-S-16 (1982).

[5] Remarks of James C. Miller III before the Japan Federation of Economic Organizations, Aug. 23, 1982, at 15.

[6] See note 4, supra, at S-14.

Patman has become well known and it is plain that we cannot expect the Department to raise Robinson-Patman claims in anything other than a Sherman Act context.

The small business community cannot explain why the Justice Department refuses to enforce the Act. One reason was advanced in 1975 when the then Assistant Attorney General in charge of the Antitrust Division, Thomas Kauper, testified that the Robinson-Patman Act should be reformed because the Act is used as a defense in price fixing proceedings. Professor Kauper thus explained that Robinson-Patman violations could be covered by actions brought under Section 1 or Section 2 of the Sherman Act.[7] There is nothing in the Act that compels competitors to talk to each other about prices. And, of course, subsequently, the Supreme Court resoundingly rejected that contention in the *United States* v. *United States Gypsum Company* decision.[8]

In accordance with an informal interagency agreement, the Federal Trade Commission has assumed the responsibility of bringing Government claims under the Robinson-Patman Act. I am attaching to this testimony data compiled by Anthony Robinson, Senior Economist, Office of Economic Research, United States Small Business Administration, on the number of antitrust cases commenced by the Government, focusing on enforcement of the Robinson-Patman Act, through June 1981. It is plain that since 1975 the number of Robinson-Patman Act cases brought is insignificant. Small business is looking to the current administration of the Commission to change this very disturbing trend. Though we may disagree with Chairman Miller on some issues including R-P, we applaud his continued statements of his intent to enforce the law, and his ongoing outreach program at the Commission to the small business community.

But according to Chairman Miller in his recent speech before the Japan Federation of Economic Organizations, only persistent price discrimination conduct cases will be brought. Under this theory, the bodies will have to be in plain sight and strewn throughout the landscape before Mr. Miller will vote to bring a Robinson-Patman complaint. "Price discrimination which is merely episodic [deserves] applause rather than prohibition," he says. (Id. at 30.)

Price discrimination is illegal. Moreover, Congress has considered and expressly rejected proposals which would allow the kinds of episodic price discrimination that would appear to be sanctioned by Chairman Miller. In the FTC's own experience, it is recognized that such a provision would insure the demise of many small sellers. Please see the testimony of Ernest G. Barnes, Assistant Chief Administrative Law Judge, FTC, before the Ad Hoc Subcommittee, supra, Part 2 at pages 172–173. Judge Barnes refers to an FTC proceeding brought against the Kraft Company involving the type of episodic price discrimination discussed here. We believe that the conduct of the Kraft Company resulted in the loss of several small businesses in the jams and jellies industries—some of which were quite substantial—in the middle Atlantic area and we request this Committee seek data from the Commission on the Kraft takeover of the jams and jellies industries and on a related proceeding entitled *National Dairy Products Corporation* v. *Federal Trade Commission*, FTC Docket No. 6465. These were examples of episodic price discrimination which the Commission at that time condemned. To our knowledge, there has been no modification of the law concerning episodic price discrimination.

Finally, if there is evidence supporting the view that Robinson-Patman is anticompetitive, the SBLC again requests that the critics of the Act immediately come forward with such evidence. We asked for such information in testimony before this Committee on December 1, 1981, and again in testimony on April 1, 1982, concerning the reauthorization of the FTC. Indeed, since 1976 Congress has sought data from the Department of Justice which support the Department's charge that the Robinson-Patman Act discourages competition.[9] Yet statements advocating a change in the law by our antitrust prosecutors continue to be made without such justification.

Finally, we are attaching to this statement a copy of the findings of the Ad Hoc Subcommittee, supra, concerning the Robinson-Patman Act. You will note the Committee's unqualified support of the Act, and in particular, its finding that the "unfounded, erroneous and unjustified allegations made against the antitrust laws in general, and the Robinson-Patman Act specifically, have had the ill effects of confusing citizens and Governmental officials . . ." The SBLC urges this Committee to reiterate to these officials its continued support of the law.

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[7] Testimony of Thomas E. Kauper, Assistant Attorney General, Antitrust Division, before the Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act, and related matters of the Committee on Small Business, House of Representatives, 94th Congress, 1st session, at 588.

[8] 438 U.S. 422 (1978).

[9] See letters to the Honorable Thomas E. Kauper and Harold R. Tyler, Jr., hearings before the ad hoc subcommittee, supra, pt. 1, at 584–585.

Let us now turn, finally, to the area of vertical restraints. On October 30, 1981 Ronald G. Carr, Deputy Assistant Attorney General, Antitrust Division, told the Ohio State Bar Association that vertical restraints, in the Division's scheme of things, should be placed somewhere down the enforcement line, "possibly to the point of vanishing." (See Mr. Carr's comments at 2.) Further, Mr. Carr viewed resale price maintenance, which is per se iilegal, as having some beneficial effect. (Id. at 4–5.) Assistant Attorney General Baxter has only recently been reported as stating that he would permit manufacturers under certain circumstances to dictate the prices charged by stores for specified products, Washington Post, August 13, 1982. We can debate the merits or the disadvantages of allowing manufacturers free reign over their independent dealers on the grounds of efficiency. Indeed, it may well be folly to accept the economic ideal of efficiency as paramount, a value to which all other are subordinate. In our political life we have learned to fear power as such—too much power in too few hands. But one thing beyond debate is that today's resale price maintenance is per se illegal. We began this testimony by commenting that there appears to be a determined effort to reverse a ninety-year tradition of antitrust enforcement. We can think of no better example of this effort and of no legitimate excuse for the Government's refusal to enforce the law as it now exists.

CONCLUSION

In conclusion, let us say that the proposals that have been emanating from Government officials who are charged with enforcing the law appear in fact to be proposals to eliminate a great deal of our national antitrust policy—a national treasure which is the result of decades of labor by Congress, by the Courts, and by independent Government agencies. We think it obvious that the future of small business is inextricably tied to this policy. We will continue to make our voices heard and deeply appreciate this opportunity to do so.

TABLE 1.—ANTITRUST CASES COMMENCED, DURING THE 12-MO PERIODS ENDED JUNE 30, 1960–81

Year	Total	U.S. cases		Private cases	
		Civil	Criminal	Electrical equipment industry	Other [4]
1960	315	60	27		228
1961	441	[1] 42	21	37	341
1962	2,079	[1] 41	33	1,739	266
1963	457	[1] 52	25	97	283
1964	446	59	24	46	317
1965	521	38	11	[2] 29	443
1966	770	36	12	[3] 278	444
1967	598	39	16	[3] 7	536
1968	718	48	11		659
1969	797	43	14		740
1970	933	52	4		877
1971	1,515	60	10		1,445
1972	1,393	80	14		1,299
1973	1,224	54	18		1,152
1974	1,294	40	24		1,230
1975	1,467	56	36		1,375
1976	1,574	51	19		1,504
1977	1,689	47	31		1,611
1978	1,507	42	30		1,435
1979	1,312	50	28		1,234
1980	1,535	39	39		1,457
1981	1,434	60	82		1,292

[1] Includes 9 U.S. electrical industry cases filed in 1961, 2 in 1962, and 3 in 1963.

[2] Includes 26 cases transferred under title 28 U.S.C. section 1404(a).

[3] All cases were transferred under title 28 U.S.C. section 1404(a).

[4] Includes antitrust cases transferred under title 28 U.S.C. section 1407.

TABLE 2-A.—FTC ENFORCEMENT OF THE ROBINSON-PATMAN ACT, 1937-81

Fiscal year	Number of complaints issued					
	Section 2(a)	Section 2(c)	Section 2(d)	Section 2(e)	Section 2(f)	Total
1937	16	5	5	7	3	36
1938	13	4	1	0	1	19
1939	24	5	3	2	1	35
1940	20	3	12	7	1	43
1941	11	43	2	2	0	58
1942	8	4	4	1	2	19
1943	6	9	0	1	2	18
1944	8	9	4	0	1	22
1945	1	17	3	2	0	23
1946	3	8	0	0	1	12
1947	3	8	1	0	0	12
1948	13	10	10	10	0	43
1949	31	31	28	24	1	115
1950	15	1	1	1	3	22
1951	8	5	4	0	1	18
1952	11	1	2	1	2	17
1953	9	3	1	1	0	14
1954	5	4	4	2	0	15
1955	12	7	1	1	0	21
1956	2	3	21	5	0	31
1957	18	8	16	0	2	44
1958	24	22	20	4	6	76
1959	22	24	24	22	2	74
1960	48	45	43	4	4	144
1961	12	39	49	33	2	105
1962	2	13	26	0	0	41
1963	8	13	192	2	0	215
1964	5	0	20	0	0	25
1965	4	0	7	0	1	12
1966	3	0	10	1	2	16
1967	2	2	3	1	1	9
1968	2	2	0	0	0	4
1969	9	1	1	0	0	11
1970	4	6	0	0	1	11
1971	4	0	5	1	2	12
1972	N/A	N/A	N/A	N/A	N/A	1
1973	N/A	N/A	N/A	N/A	N/A	1
1974	N/A	N/A	N/A	N/A	N/A	6
1975	N/A	N/A	N/A	N/A	N/A	0
1976	N/A	N/A	N/A	N/A	N/A	1
1977	N/A	N/A	N/A	N/A	N/A	1
1978	N/A	N/A	N/A	N/A	N/A	1
1979	N/A	N/A	N/A	N/A	N/A	0
1980	N/A	N/A	N/A	N/A	N/A	1
1981	N/A	N/A	N/A	N/A	N/A	1

Source: Table 1, "The Robinson-Patman Act, Federal Regulation of Price Differences," Richard A. Posner, American Enterprise Institute for Public Policy Research, Washington, D.C., 1976, and "Trade Regulation Reporter, FTC Complaints and Orders," Commerce Clearinghouse, Inc., Chicago, Ill.

TABLE 2-B.—FEDERAL TRADE COMMISSION ROBINSON-PATMAN ORDERS SINCE THE FINALITY ACT

Fiscal year	Section 2(a)	Section 2(c)	Section 2(d)	Section 2(e)	Section 2(f)	Total
1960	5	6	33	1	1	46
1961	11	56	18	1	4	90
1962	11	37	24	2	1	75
1963	7	17	225	2	1	252
1964	28	1	81	4	2	116
1965	5	1	32	0	0	38
1966	5	0	65	0	2	72
1967	8	1	9	1	0	18

TABLE 2-B.—FEDERAL TRADE COMMISSION ROBINSON-PATMAN ORDERS SINCE THE FINALITY ACT—Continued

Fiscal year	Section 2(a)	Section 2(c)	Section 2(d)	Section 2(e)	Section 2(f)	Total
1968	3	6	2	1	1	13
1969	3	6	0	0	1	10
1970	6	0	2	0	0	8
1971	5	0	6	3	1	15
1972	1	2	1	0	0	4
1973	1	2	0	0	0	3
1974	1	0	2	0	0	3
1975	2	2	0	1	0	5
1976[1]	N/A	N/A	N/A	N/A	N/A	2
1977	N/A	N/A	N/A	N/A	N/A	1
1978	N/A	N/A	N/A	N/A	N/A	1
1979	N/A	N/A	N/A	N/A	N/A	1
1980	N/A	N/A	N/A	N/A	N/A	1
1981	N/A	N/A	N/A	N/A	N/A	3

[1] The data since fiscal year 1976 include only consent orders and final orders. Pre-1976 data may include interlocutory orders which may result in having more than one order associated with a particular case.

Source: U.S. Congress, "Recent Efforts to Amend or Repeal The Robinson-Patman Act," a report of the ad hoc Subcommittee on Antitrust, The Robinson-Patman Act, and related matters of the Committee on Small Business, pp. 128–132, and "Trade Regulation Reporter, FTC Complaints and Orders," Commerce Clearinghouse, Inc., Chicago, Ill.

TABLE 2-C.—COMPLAINTS, CONSENT ORDERS, AND FINAL ORDERS ISSUED BY THE FEDERAL TRADE COMMISSION ON THE ROBINSON-PATMAN ACT BY FISCAL YEARS 1975–81

Fiscal year	Complaints	Consent orders and final orders
1975	0	1
1976	1	2
1977	1	1
1978	1	1
1979	0	1
1980	1	1
1981	1	3

Source: "Trade Regulation Reporter, FTC Complaints and Orders," Commerce Clearinghouse, Inc., Chicago, Ill.

TABLE 3.—ANALYSIS OF ROBINSON-PATMAN DECISIONS AS REPORTED IN CCH, "TRADE CASES IN 1980"

63,000 to 63,569	Plaintiff	Defendant	Decision held for
63229 (1)	S	B	Defendant/B.
63281 (2)	S	B	Do.
63022 (3)	S	B	Do.
63067 (4)	S	B	Do.
63194 (5)	S	S	Defendant/S.
63343 (6)	S	B	Defendant/B.
63364 (7)	B	S	Plaintiff/B.
63404 (8)	S	B	Defendant/B.
63367 (9)	S	B	Do.
63357 (10)	S	S	Plaintiff/S.
63291 (11)	S	S and B	Defendant/S and B.
63562 (12)	S	S and G	Defendant/S and G.
63434 (13)	S	B	Defendant/B.
63538 (14)	S	B	Do.
63313 (15)	S	S	Defendant/S.
63430 (16)	B	B	Defendant/B.

TABLE 3.—ANALYSIS OF ROBINSON-PATMAN DECISIONS AS REPORTED IN CCH, "TRADE CASES IN 1980"—Continued

63,000 to 63,569	Plaintiff	Defendant	Decision held for
63555 (17)	S	B	Do.
63491 (18)	B	B	Do.

Note.—S=small business; B=big business; G=governmental entity.

Union Calendar No. 866

94th Congress, 2d Session - - - - - - - - House Report No. 94–1738

RECENT EFFORTS TO AMEND OR REPEAL THE ROBINSON-PATMAN ACT

A REPORT

OF THE

AD HOC SUBCOMMITTEE ON ANTITRUST, THE ROBINSON-PATMAN ACT, AND RELATED MATTERS

OF THE

COMMITTEE ON SMALL BUSINESS

HOUSE OF REPRESENTATIVES

TOGETHER WITH

ADDITIONAL VIEWS

SEPTEMBER 30, 1976.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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"CHAPTER XIV. FINDINGS AND CONCLUSIONS

"The Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act, and Related Matters of the Committee on Small Business, House of Representatives, finds and concludes that:

"1. The Robinson-Patman Act, which is an important part of the antitrust laws of the United States, should not be repealed nor emasculated nor weakened in any way whatsoever; neither should it be amended. However, in order to provide additional leverage in furtherance of the beneficent purposes of this time-proven law, Section 3 of the Robinson-Patman Act should, by Congressional action, be included within the term 'antitrust laws.'

"2. The Robinson-Patman Act has implemented the clearly expressed national public policy '* * * that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small business concerns in order to preserve free competitive enterprise * * *.' Therefore, the Robinson-Patman Act must be effectively enforced by those Governmental agencies which are charged with the duty to execute and enforce its provisions.

"3. 'Regulation,' as that term is normally used by this and other Congressional committees, means supervisory control by an administrative body that substitutes for the impersonal control of the free market. In that sense, neither the Robinson-Patman Act nor other provisions of law making it illegal to use price discriminatory acts or practices are regulations of business. The antitrust laws, of which the Robinson-Patman Act is an integral part, do not require the promulgation of regulations to control business activities. The antitrust statutes merely require that business avoid such acts and practices which restrain, injure, damage, or destroy small business through price discriminatory practices or tend to create a monopoly. The provisions of the Robinson-Patman Act call for no paperwork on the part of businessmen who comply with the spirit and intent of the law. Calling one thing or law by a different name cannot possibly change the true character of that thing or statute.

"4. It appears that certain special interests who oppose the antitrust laws, including the Robinson-Patman Act, have mounted strong and vigorous campaigns, including lobbying activities and making erroneous charges to the effect that the Robinson-Patman Act impedes competition. Such activities and allegations were made by these special interests and others in their efforts to weaken or repeal the Robinson-Patman Act which together with the other antitrust laws are, in fact, a basis for economic freedom of Americans. Therefore, vigilance is needed and prompt action required to oppose these special interest groups and other individuals who would like to emasculate or even do away with such needed laws.

"5. The unfounded, erroneous and unjustified allegations made against the antitrust laws in general, and against the Robinson-Patman Act specifically, have had the ill effects of confusing citizens and governmental officials and misleading them into the belief that those laws against price discrimination practices destructive of competition are anticompetitive and undesirable and should be repealed.

"6. The lobbying activities and unjustified allegations made against the Robinson-Patman Act had the further unfortunate effect of persuading or leading some public officials who are charged with the duty, responsibility, and obligation to enforce this law, to refrain from its full and complete enforcement with the result that the Congressional intent is thwarted and a bureaucratic repeal effected. The Ad Hoc Subcommittee condemns such lobbying activities on the part of special interest groups as well as others so lobbying."

Mr. LUKEN. We are going to recess in just a moment for about 5 minutes, or however long it takes to traverse the distance to the House floor and back to vote.

But there is something you just stated that perhaps we should take up right now and in the next couple of minutes about prosecutorial discretion and the analogy between the kind of prosecutorial discretion which Mr. Baxter and others in the Justice Department have outlined and the kind exercised in the more traditional criminal field. Obviously, there is reason for some prosecutorial discretion, perhaps due to heavy caseloads. And there might be cases in the criminal field that would be so minute and insignificant that they would be considered technical de minimis propositions. But what we are saying here, and what you have said, as I understand it—and I would like you to comment on it--and what the members of the committee have alluded to, is that there seems to be a pattern of action and statements on the part of Mr. Baxter and the Department of Justice and the officials within the administration which might be construed as flouting the law rather than enforcing it.

Would you want to comment on that long statement?

Mr. **Blum**. If I discern the question from you, Mr. Chairman——

Mr. **Luken**. Well, just comment on it. That's my statement.

Mr. **Blum**. From the small business perspective, we believe it is difficult enough to deal with suppliers when there is an existing law on the books with respect to Robinson-Patman and resale price maintenance. With respect to the policeman on the beat concept, if you not only take the policeman off the beat but have the policeman back in the stationhouse saying "Aw, that law ain't worth a damn anyway," I think the message that is going to be received out there in the marketplace is that certain practices that were before prohibited and, indeed, suppliers may have refrained from them, you're going to see, in our view, open season on small business.

Mr. **Luken**. All right.

We will now recess for approximately 5 minutes, and we will continue, if you will remain, Mr. Blum.

[A short recess was taken.]

Mr. **Luken**. Thank you, Mr. Blum, for remaining with us. We will now ask Mr. Daub if he has any questions.

Mr. **Daub**. I do have a question, Mr. Chairman. I appreciate this opportunity.

One of the things we have in common, of course, is my great interest in the independent sales representative, if you recall from other times we have met, so I am really appreciative of your interest in this particular subject.

You are referring to tables in your testimony, 2(a) and 2(b). The tables indicate a significant drop in the number of complaints issued since 1972. How has this long-term, in my view, lack of enforcement affected your membership. A second question is, can you give us examples of small businesses closing because the FTC and/or the Department of Justice have failed to enforce Robinson-Patman or the antitrust laws?

Mr. **Blum**. Mr. Daub, with respect to the second question first, if I might, with the committee's permission, I would like to respond to that question at a later time in written form and see whether we can come up with some specific data on that, about closings, if we have that.

Mr. **Daub**. That would be fine.

Mr. **Luken**. If that is agreeable with Mr. Daub, then we will leave the record open, with unanimous consent.

Mr. **Daub**. Yes. I look forward to your letter for the record on that subject.

Mr. **Blum**. With respect to the first question, we have indications from the field that, indeed, in the last several years, perhaps in the last 2 to 3 years, that in the area of pricing practices there has been an increase in the attempts to impose a resale price maintenance, and also in the area of Robinson-Patman discriminatory pricing. In terms of individual industries that have been most impacted, I think there has been a substantial amount of impact in the oil industry that I'm aware of, I believe with respect to jobbers, and they have had some problems in that area. With respect to my particular industry, we do not have that problem. I have a friend and colleague from the home remodeling industry and I might ask him if he has anything further from that industry in the area of Robinson-Patman and price discrimination generally.

Mr. SEIFERT. I would say, Mr. Daub, your question is most perceptive. There literally has been a strike by the Government in terms of bringing Robinson-Patman cases. In the sixties, it was commonplace for the Government to initiate 100 to 200 cases annually. That figure from 1972 on has been about 1. We have been advised officially that the Government is bringing no Robinson-Patman cases. Those are private sector cases which have been increasingly large.

While I may, I would like to comment on one other thing that Mr. Blum has pointed out. With respect to the cases brought by the Department of Justice, the overwhelming number of cases in the last year shown as 1981 fiscal year have been the highway paving cases, which originated in a prior administration. The greater bulk of those listed are not cases that have been brought by Mr. Baxter. If you subtracted the highway cases from those that are listed, you would find a virtual strike on Sherman Act prosecutions.

Mr. DAUB. I appreciate that.

Mr. SEIFERT. There is literally no activity from either side of Government in terms of origination and new cases.

Mr. DAUB. Your answer is most helpful. Thank you very much. I appreciate both you gentlemen's answers.

That's all I have, Mr. Chairman.

Mr. LUKEN. Thank you very much, Mr. Blum. We appreciate your testimony. I think it gives us a good basis for proceeding with other aspects of the hearing.

Mr. LUKEN. Mr. Peabody, we understand that your plane schedule would indicate that we should take you next.

Mr. PEABODY. I appreciate that, Mr. Chairman, and members of the committee.

My statement is short, and recognizing that you do have a number of witnesses——

Mr. LUKEN. We have several witnesses of the general tenure of what I think you have to say, but we certainly are very interested in what you have to say. I believe we have your statement for the record and, without objection, it will be admitted. You may summarize it or present it in any way you see fit.

TESTIMONY OF ENDICOTT PEABODY, ON BEHALF OF THE NATIONAL MASS RETAILING INSTITUTE

Mr. PEABODY. I will try to summarize my statement, Mr. Chairman, and keep my remarks short.

On behalf of the National Mass Retailing Institute, a trade association of discount retailers, we are very appreciative of the opportunity to appear before this committee. I should tell you that many of these retailers, perhaps most, started as very small businessmen. Many now have expanded into chain stores across the country, in almost every State of the Nation. Some NMRI members are still small businessmen with a very few number of stores, even though they might be considered mass merchandisers. We are extremely concerned by the problem posed by you, Mr. Chairman, and Mr. Daub, and are grateful to this committee for highlighting this very serious issue. This issue affects not only retailing, but consumers across the Nation.

We believe that discount retailers, whom we represent, are the most efficient distributors of goods in our economy. We serve consumers that seek out competition in both the price of goods and the quality of service provided the consumer. We believe our members offer a desired blend of low price and excellent service to our customers. Our belief has been vindicated by our good marketing success to date. We have attracted customers to our stores because we offer competitive prices and competitive services.

We are able to serve the demands of our customers in large part because the antitrust laws—as enacted by Congress and as interpreted by the courts—presently favor competition. We are profoundly disturbed by efforts of the present administration's antitrust officials, notably Assistant Attorney General Baxter and Federal Trade Commission Chairman Miller, to alter unilaterally the antitrust laws. We refer to the efforts of these administration officials as "supply side antitrust," because their antitrust philosophy suggests an undue emphasis on the importance of the manufacturing community in the distribution of goods in our economy, at the expense of other factors in the distribution scheme, and most importantly, at the expense of the consumer.

In ascribing the label "supply side" antitrust to these antitrust officials, we do not mean to denigrate the role of manufacturers in our economy. Without manufacturing, there could be no goods to distribute. However, we believe that the present administration leaders in this area have placed disproportionate emphasis on the manufacturing sector of our economy in fashioning its antitrust enforcement policies.

Indeed, the present administration's leaders whom I referred to seem to follow blindly the so-called Chicago School of Economics which itself places undue influence on manufacturers. We, in turn, are at times referred to by Mr. Baxter as "pirates, free riders, patent infringers, and flea market peddlers." As you might imagine, we are disturbed by these aspersions. However, we are willing to fight the supply side antitrust philosophers on the merits of the debate.

Mr. LUKEN. It sounds like you're in an adversarial situation with Mr. Baxter, doesn't it. [Laughter.]

Mr. PEABODY. Yes, sir.

The leading spokesman for the Chicago School—indeed, the prophet that authored the bible of the Chicago School economics—may well be Robert Bork, a distinguished American scholar. Unfortunately, Mr. Bork, Mr. Baxter, and Mr. Miller seem not to have spent any time at all in the retailing sector. Mr. Bork, in an article that we have already supplied to the committee staff through Miss Lachance, summarizes his views by contending that a manufacturer's interest "is the same as the consumers." In addition, he contends that, in contrast, a retailer's interest is simply "parochial."

We vigorously dispute each of his points, and those of other supply side antitrust believers.

We ask these questions: How can consumer welfare be enhanced, as Mr. Bork contends, if consumers are deprived of the right to shop for a competitive price? How can output be increased, as the Chicago School argues, if consumer prices are higher and consumer demand is thwarted, thereby reducing the volume of purchases? How can efficiency be provided if the Nation's most efficient retailers—the mass merchandisers—are denied the right to sell goods?

We refer you on this point to a recent article of a Federal Commission economist, Robert Steiner, who concluded that mass merchandisers epitomize efficiency.

The Bork "free market" or supply side view abdicates the Government's enforcement policy by blind faith in the free market. If you use the same free market rationale, polluters would be free to dump wastes, employers free to charge less than the minimum wage, and sellers would be free to eliminate warranties of goods. Just because the conduct occurs in the free market does not mean that it should be acceptable.

A manufacturer's prohibition on price competition has the identical effect as does an agreement among retailers not to compete on price. There is no doubt, as of yet, that the latter agreement would be considered per se illegal under the antitrust laws.

The so-called free rider doctrine that is at the root of the supply side antitrust theory is a phantom, a make-weight that insults the intelligence of consumers.

The tenet of supply side antitrust is that manufacturers are best suited to make distributional decisions and best suited to serve their consumers. In Mr. Bork's phase, manufacturers, interests are identical to consumers. That is a naive and uninformed view. Manufacturers are steps away from the ultimate sale to the consumer, and like the supply side economists, the supply side antitrust lawyers don't understand that consumers are the ultimate decisionmakers as to what will propel the economy.

All representatives of this committee certainly understand that the individual voters of this country elect our officials. So too is it true in the marketplace. The voters are the consumers and they have elected to buy goods from mass merchandisers, as well as others, of course. They are pleased with the product, the price, and the service that we offer. We hope that these officials whom you have brought to this committee will not snuff out this consumer choice and give absolute discretion to the actor most distant from the ultimate sale, namely the manufacturer.

We thank you, Mr. Chairman, for being able to present our views.

[Mr. Peabody's prepared statement follows:]

PREPARED STATEMENT OF ENDICOTT PEABODY, ON BEHALF OF THE NATIONAL MASS RETAILING INSTITUTE

My name is Endicott Peabody of the law firm of Peabody, Lambert & Meyers. I am here today on behalf of the National Mass Retailing Institute, a trade association of 135 discount retailers with 10,000 stores accounting for over $57 billion in annual sales. Our members are located in every Congressional district in this country. We are extremely concerned with the present government enforcement policies concerning our nation's antitrust laws, notably those prohibiting price fixing by manufacturers, whether done by agreement among manufacturers or by manufacturers' coercion of retailers. We appreciate the opportunity to address this Committee today.

Discount retailers represent the most efficient distributors of goods in our economy. We serve consumers that seek out competition in both the price of goods and the quality of service provided the consumer. We believe that our members offer a desired blend of low price and excellent service to our customers. Our belief has been vindicated by our good marketing success to date. We have attracted customers to our stores because we offer competitive prices and competitive services.

We are able to serve the demands of our customers, in large part, because the antitrust laws—as enacted by Congress and as interpreted by the courts—presently favor competition. We are profoundly disturbed by efforts of the present Administration's antitrust officials—notably Assistant Attorney General William Baxter and Federal Trade Chairman James Miller—to alter unilaterally the antitrust laws. We refer to the efforts of these administration officials as "supply side antitrust," because their antitrust philosophy suggests an undue emphasis on the importance of the manufacturing community in the distribution of goods in our economy, at the expense of other actors in the distribution scheme and, most importantly, at the expense of the consumer.

In ascribing the label "supply side" antitrust to the Reagan Administration antitrust officials, we do not mean to denigrate the role of manufacturers in our economy. Without manufacturing, there could be no goods to distribute. However, we believe that the present Administration has placed disproportionate emphasis on the manufacturing sector of our economy in fashioning its antitrust enforcement policies. Indeed, the present Administration seems to follow blindly the so-called "Chicago School of Economics" which itself places undue influence on manufacturers. We are alternately referred to by Mr. Baxter as "pirates, free riders, patent infringers, and flea market peddlers." As you might imagine, we are disturbed by these aspersions. However, we are willing to fight the supply side antitrust philosophers on the merits of the debate.

The leading spokesman for the Chicago School—indeed the prophet that authored the bible of the Chicago School economics—may well be Robert Bork, a distinguished American scholar. Unfortunately, Mr. Bork, Mr. Baxter and Mr. Miller seem not to have spent any time at all in the retailing sector. Mr. Bork, in a 1966 article in the Yale Law Journal, set out the supply side antitrust gospel. He makes the following points:

(a) All antitrust inquiries should be focused on a few questions:

(i) Is consumer welfare enhanced or reduced by the agreement in question?

(ii) Is output restricted or increased by the agreement in question?

(iii) Does the agreement cause efficiency or inefficiency?

(b) With these principal questions in mind, Bork argues that vertical restraints generally are consumer welfare enhancing, output enhancing, and efficiency enhancing. When a vertical restraint does not produce these results, it is because the manufacturer has made a commercial mistake, a mistake that will be rectified by the market's reaction. In Bork's view, the market, not the government or the judiciary, should correct distributional errors.

(c) A well thought out vertical restraint does not have the same end effect as does a horizontal agreement among competitors. That is, manufacturer-imposed resale price maintenance does not cause the same result as does an agreement among dealers to fix prices.

(d) Fixed resale prices force more competition since manufacturers want competition in services and sales. Without fixed resale prices, there may be no competition in services and sales, but only on price. This will result in low price competitors taking a "free ride" on companies that provide desired services.

Bork, in a subsequent article which we have already supplied to the Committee staff, summarizes the above stated views by contending that a manufacturer's interest "is the same as the consumers'." In addition, Bork contends that, in contrast, a retailer's interest is simply "parochial."

We vigorously dispute each of Mr. Bork's points and those of other supply side antitrust believers. We will briefly address each of these contentions. First, we ask the following questions:

(a) How can consumer welfare be enhanced, if consumers are deprived of the right to shop for a competitive price? How can output be increased if consumer prices are higher and consumer demand is thereby thwarted, thereby reducing the volume of purchases? How can efficiency be provided if the nation's most efficient retailers—the mass merchandisers—are denied the right to sell goods?

On this point, we refer the Committee to the recent article of Federal Commission economist Robert Steiner, who concluded that mass merchandisers epitomize efficiency. (We have previously supplied a copy of that article to this Committee.)

(b) Next we note that the Bork free market or supply side view abdicates the government's enforcement policy by blind faith in the free market. Using the same free market rationale, polluters would be free to dump wastes wherever they chose to because that was a free market decision; employers would be free to charge less than the minimum wage because the free market permitted it; sellers would be free to eliminate all warranties of goods because consumers would accept a product without warranties. Those "free market" examples demonstrate the circularity of the Chicago School theory. Just because the conduct occurs in the free market does not mean that it should be acceptable.

(c) A manufacturer's prohibition on price competition has the identical effect as does an agreement among retailers not to compete on price. There is no question—as of yet—that the latter agreement would be considered per se illegal under the antitrust laws. No more need be said about this point—the elimination of intrabrand price competition will cause, on its face, adverse consequences to the consumer.

(d) The so-called "free rider" doctrine is a phantom, a supply side make weight that insults the intelligence of consumers. Can Bork, Baxter and Miller really believe that all consumers will not want service for their goods? Can they believe that consumers will not seek out and be willing to pay for service for their goods? Do Bork, Baxter and Miller really believe that discounters—the mass merchandisers that appear today before you—do not offer good service? We dare any manufacturer to produce evidence that mass merchandisers do not offer adequate warranty protection, do not accept the return of defective goods, and do not advertise their goods. The evidence that price discounters are free riders is simply nonexistent.

Finally, I address myself to the bottom line conclusion of the supply side antitrust enforces—that manufacturers are better suited to make distributional decisions and better suited to serve their consumers. In Bork's phrase, manufacturers' interests are "identical to consumers'." That is a naive and uninformed view. Manufacturers are steps away from the ultimate sale to the consumer. Like the supply side economists, the supply side antitrust lawyers do not understand that consumers are the ultimate decision-makers as to what will propel the economy. All representatives of this Committee certainly understand that the individual voters of this country elect our officials. So too is it in the market place: the voters are the consumers and they have elected to buy goods from mass merchandisers. They are pleased with the product, the price, and the service that we offer. The Reagan administration antitrust officials want to snuff out this consumer choice and give absolute discretion to the actor most distant from the ultimate sale—the manufacturer.

We urge this Committee to protect the freedom of small retailers, and all retailers, to price goods in response to consumer demands, not in respoonse to manufacturers' dictates.

We have already supplied this Committee with certain background material. We would be hapy to provide more should the Committee desire. We are of course, prepared to answer any questions you may have.

Mr. LUKEN. I will ask Mr. Daub to lead off with any questions or observations that he may have.

Mr. DAUB. Just an observation, maybe in turn an observation by you. I am an attorney, and I also have been engaged in manufacturing, in retailing. As a matter of fact, in my last 10 years before this privilege to serve in Congress I was a supply-sider, sir, and I do believe that I am not a purist, however. So if you try to be practical or pragmatic about trying to take a look at the relationship between the manufacture and distribution systems, would there be any possibility, in your view, in your experience, that we have overdone the concept that the free market needs to be managed?

Mr. PEABODY. I think there is a common feeling on that which has been expressed quite frequently: that we have been overregulated and that the free market does certainly need to be allowed to breathe. I think that is happening.

Mr. **Daub**. Then would your view be that, in fact, it is like the rules of the road? We decided a long time ago that there was a certain utilitarian objective that we all drove down the right-hand side of the street, and when we saw a green light we would go and a stop sign we would stop; although the speed limits may vary from State to State, there was a certain objective of less loss of life and property damage if we had certain rules; that, therefore, becomes a limitation on us, but, in fact, it is one we consider right, so antitrust laws vigorously prosecuted ought to be a rightful limitation in the free marketplace?

Mr. **Peabody**. I think you have spelled that out very accurately, Mr. Daub; I think the antitrust laws, as you have spelled out earlier and are reviewing the present time, are ingrained in the economy and in the laws of the United States of America going back well over a century. The courts have given a consistent interpretation to the laws. Resale price maintenance has been considered per se illegal. I don't understand why a rule of reason application should be given to a practice which has consistently been considered per se illegal. You should enforce the per se rule.

Mr. **Daub**. Do you suppose we're just going through a pendulum swing, that maybe we are trying to find some common ground where there can be some enforcement. It is not just this administration, is it, if you look at the record. I mean, it goes back now three administrations that have really failed, arguably, to pursue this issue of proper enforcement. Isn't that right?

Mr. **Peabody**. I think it was Mr. Seifert who talked about the recent history of Robinson-Patman enforcement. The nonenforcement of resale price maintenance, which is what we are raising now, has occurred most recently. Indeed, the last administration vigorously enforced resale price maintenance bringing, on one occasion, criminal charges against a manufacturer.

Mr. **Daub**. Wasn't there a decision in the last 3 or 4 years that decided that that wasn't going to be the domain of the Federal Government any more anyway, and we're going to leave it up to the States with respect to price fixing?

Mr. **Peabody**. With respect to resale price maintenance and price fixing?

Mr. **Daub**. Yes.

Mr. **Peabody**. Not in our judgment. We would hope that the Federal Government would continue its enforcement in this area.

Mr. **Daub**. That's all I have.

Mr. **Luken**. Do you have any comment on the statement that the FTC enforcement is being relaxed by court decision, by a trend in court decisions today?

Mr. **Peabody**. I would not feel that that is the case, Mr. Chairman. I think the voluntary statements which have been made and which have been given great publicity in the newspapers by the leading law enforcement officers is doing the bulk of this undermining of the enforcement of the laws. If you are put on notice that they are not going to enforce the law against resale price maintenance, that is very damaging to the economy right then and there.

Mr. **Luken**. So would it be your view, then, that the enforcement by the Department of Justice and by the Federal Trade Commission, within bounds that they sometimes describe as prosecutorial discretion, really amounts to a subjective interpretation on their part as to when they want to interpret the—it's completely subjective?

Mr. PEABODY. I would agree.

Mr. LUKEN. It seems to me it has that vice from what I have been observing, that the only touch stone they seem to have is, does it promote efficiency, and then it is their idea of what efficiency. It would depend, it seems to me, on a great deal of in-depth investigation before they could consider any case, because they would have to redefine efficiency every time.

The only other question I have is what is your experience or what the experience of similar representatives and groups has been in communicating your views to antitrust officials within the Government.

Mr. PEABODY. Yes, indeed, along with Mr. Borda, who is going to testify shortly, we visited with Mr. Baxter and expressed our views very forcefully to him.

Mr. LUKEN. How long ago was that?

Mr. PEABODY. It was last spring, in late March.

Mr. LUKEN. Of 1982 or 1981?

Mr. PEABODY. 1982.

Mr. LUKEN. And what reaction did you get?

Mr. PEABODY. I personally was not present. My office colleague, William Coston, who is out of town today, was present with Mr. Borda. I am sure he can speak better than I can. I can simply say that Mr. Baxter rejected our petition to him, arguing that a manufacturer is best able to determine the prices at what goods should be sold.

Mr. LUKEN. You say Mr. Borda was actually present, so we can get that directly from him.

All right. If there is nothing else from the members of the committee, then, we thank you very much for your very intelligent and helpful observations.

Mr. PEABODY. Thank you. I appreciate your putting me on out of the scheduled order.

Mr. LUKEN. Now we will get back into the regular order and ask Mr. William Woods, Mr. Johnson and Mr. Rector to please be seated at the witness table.

I will now ask Mr. Daub to initiate the proceedings at this point.

Mr. DAUB. Well, I appreciate the point of privilege. I certainly am glad that Mr. Rector and Mr. Woods are joining one of my constituents from Bellevue, Nebr. It is a great honor for me to have before the committee today Mr. John A. Johnson of Bellevue. Mr. Johnson is one of those rare individuals whose life has made a real difference in both the business world as well as the community.

As a member of the Bellevue City Council 30 years ago, he promoted both the paving of Bellevue streets and the development of bus service that transformed Bellevue into a thriving community with a strong small business base. As a result, of course, it attracted the location of the Strategic Air Command headquarters, to that community.

He has served as president of the chamber of commerce and in that capacity helped to lead Bellevue into an era of growth and prosperity. During that period he led the fund-raising effort to finance our Midlands Community Hospital there.

Mr. Johnson has served as a regional delegate and as a national delegate to the White House Conference on Small Business, and was honored in 1980 as, "Family Owned Business Advocate of the Year" by the Small Business Administration. In 1979 John Johnson was named chairman of the executive committee of the National Association of Retail Druggists, and currently serves as president-elect.

John Johnson brings to this committee the experience of a man who has spent a life devoted to the community and who has a keen understanding of the small business community in particular. His experience is not limited to his business alone but consists of the knowledge and experience of a man who has worked with thousands of others over the last 30 years and can put in perspective for us the challenges and frustrations that confront individuals who make up the most productive segment of our economy.

We here in Congress hear much about small business, but we hear far too little from small business. Their problems do not always present themselves in such a fashion that the Federal Government can fashion a legislative solution, but we risk a great deal when we overlook these problems. I am confident, Mr. Chairman, that Mr. Johnson can provide us with insight that 100 lobbyists could not and I look forward to hearing from him today.

Thank you.

Mr. LUKEN. Thank you very much, Mr. Daub. I join in the accolades and it is our pleasure in receiving your testimony.

Do each one of you have a statement, or is it a combined statement?

Mr. WOODS. Mr. Chairman, we have one summary statement that would be divided between Mr. Johnson and myself, if that is appropriate.

Mr. LUKEN. All right. The statement which we have received will be received into the record by unanimous consent, and you may proceed to give it, summarize it, or present it in any way you see fit.

TESTIMONY OF WILLIAM E. WOODS, EXECUTIVE VICE PRESIDENT, NATIONAL ASSOCIATION OF RETAIL DRUGGISTS; ACCOMPANIED BY JOHN A. JOHNSON, PRESIDENT-ELECT, AND JOHN M. RECTOR, DIRECTOR OF GOVERNMENT AFFAIRS, NARD

Mr. WOODS. Mr. Daub, we certainly share your views of commendation of Mr. Johnson. He has shown the same leadership in this association that he did back home, and we are very proud of your comments.

Mr. DAUB. I appreciate that.

Might I let the record also reflect, if I could, that Dr. William Tindall, if he could raise his hand for all in the hearing room to see, professor of pharmacy at Creighton University in Omaha, who is also presently president of the Greater Omaha Pharmacy Association, is with Mr. Johnson today. We appreciate him being here.

Mr. WOODS. I am William E. Woods, executive vice president of the National Association of Retail Druggists, and as Mr. Daub has indicated, John Johnson, our president-elect, will be installed in Boston at our annual convention in 4 short weeks, and Mr. John Rector, director of our government affairs, are here with me today. President Johnson and myself will divide up the summary statement.

The National Association of Retail Druggists represents owners of more than 30,000 independent pharmacies, where over 75,000 pharmacists dispense some 70 percent of the Nation's prescription drugs. Together, they serve 18 million persons daily and provide nearly 90 percent of the medicaid pharmaceutical services. NARD has long been acknowledged as the sole advocate for this vital component of the free enterprise system.

As owners of independent pharmacies, our members are committed to legislative and regulatory initiatives designed to provide them a fair chance to compete. We especially appreciate the opportunity to appear before the subcommittee to present testimony on Robinson-Patman, merger policy, and their respective impacts on independent retail drug stores. We would like to express our special appreciation to the subcommittee, its chairman and staff, for the extraordinary cooperation that you have shown NARD in the planning of this important oversight hearing.

The independent community pharmacist of today is simultaneously a health care professional and a small businessperson. The independent pharmacist of today is called upon to serve a wide range of health care needs of the community.

The vital services which I have briefly described above are not provided by many of the pharmacies in the large corporate chain drug and grocery store corporations owned by nonpharmacists. Few chains permit consultation between the pharmacist and the customer, as it is provided by the independent pharmacist. Some have their prescription department open only part of the time that the rest of the store is open. One of the key methods of controlling cost by the chains is the maintenance of a limited inventory of vitally needed prescription drugs. All of these measures may mean cost savings for the corporate chains, but they are a disservice to the prescription holder in communities throughout the land.

At this point I would like to turn this statement presentation over to president-elect Johnson.

Mr. JOHNSON. Mr. Chairman, I appreciate this opportunity to discuss the merger policy as we see it.

The Clayton Act was passed to prevent anticompetitive conduct associated with concentrated industries by preventing concentration at its incipiency. While section 1 of the Sherman Act only prohibits combinations that operate "in restraint of trade," section 7 of the Clayton Act is deliberately more expansive and reaches acquisitions that "may" tend to substantially lessen competition. No certainty is required. If an acquisition "may" substantially lessen competition, the Clayton Act makes it unlawful. In accordance with this directive, section 7 has been used effectively to promote competition by insuring the presence of an adequate number of competitors.

Recently, however, section 7 has not prevented a wave of acquisitions involving the large retail drug store chains. Companies such as Revco, Rite-Aid, Jack Eckard, and Walgreen's, to name a few, have reached their giant size not by internal growth, but rather by acquiring other and often significant chains and other small drug stores. Fewer and fewer corporate chains are controlling a greater and greater share of this Nation's retail pharmacy business. This trend has seriously and adversely affected the ability of the small independent community pharmacies to compete. As a result, these pharmacies have been driven out of business by the predatory practices that some of these deep-pocket chains engage in.

For the most part, these acquisitions have proceeded without objection from the Government. Thus, despite the fact that section 7 prohibits acquisitions that "may" substantially lessen competition, those persons charged with enforcing section 7 of the Clayton Act seem to have replaced the word "may" with the words "will certainly."

This change in enforcement posture, we are told, is institutionalized in the new merger guidelines recently announced by the Department of Justice. The guidelines make it clear that the fact that an acquisition may lessen competition is no longer enough to provoke a Government challenge. Much more is now required. Thus, policymakers have taken it upon themselves to amend section 7 of the Clayton Act to eliminate its use as a vehicle to challenge anticompetitive conduct in its incipiency.

Thus, NARD believes that Congress should reaffirm the goals of section 7 and stress that it is intended to prevent industry concentration before concentration reaches extraordinarily high levels.

Concerning the Robinson-Patman Act, the subcommittee is likewise interested in the importance of the Robinson-Patman enforcement to the independent retail druggist. If larger corporate chains are encouraged by nonenforcement of the Robinson-Patman Act to use their national buying power to illegally induce price favors from drug companies and suppliers, the result will be the creation of a pharmacy monopoly in these communities. In some areas it is even conceivable that a single chain drug store will be left to serve several communities. This forecast is not difficult to make considering the predatory practices used by some of these chains today. These practices demonstrate that their chief concern is the development of store traffic, not service or health care delivery. These chains will use a prescription department as a loss leader just as quickly as they will sell antifreeze, maple syrup, and kosher pickles below cost.

As we understand the administration's position, it is in favor of less Government regulation. It feels that Federal regulation has shackled competition. Let me say that the members of NARD applaud that goal. Let me also say that to the extent that this approach is applied to industries which have had entry and prices controlled by regulatory agencies, this might, after careful weighing of the original reasons for regulation, result in some competitive gains.

I think that it is necessary to focus on a few facts, which again would seem to be self-evident, but which have apparently in the past decade escaped recognition by the Department of Justice. All antitrust statutes are a form of regulation of the free enterprise system.

The basic philosophy behind these early antitrust statutes was a reaffirmation of this country's belief in a free enterprise system and a concern that competition within that system be limited to those acts and practices which would preserve for the long term a healthy, competitive economy.

The Robinson-Patman Act is an expression of this basic philosophy. The evils which the Robinson-Patman Act addresses had been recognized as pernicious as early as 1887. The passage of the Robinson-Patman Act in 1936 was, therefore, not the response to a new evil but an attempt to strengthen the regulation of a long recognized evil. Congress was stating that preferential treatment provided to large buyers because of the pressure which they can place on a seller are not practices which lead to the end sought by the antitrust laws. Such practices can only lead to further concentration of power and diminished competition.

The Robinson-Patman Act can probably be best understood as a prophylactic measure: If Congress did not prohibit the practices covered by the act, it would only be a matter of time before the antitrust enforcement agencies were faced with monopoly or oligopoly situations requiring the application of other sections of the antitrust laws, such as section 2 of the Sherman Act.

NARD believes that Congress analysis in 1914 and 1936 was accurate. The end result in many areas would be a monopoly or duopoly situation controlled by some large out-of-state corporate chain drug store, little concerned with serving the community except to the extent that it has a positive effect on its corporate ledger.

When Congress was considering passage of the 1936 act, it did not do so in a factual vacuum. Congress conducted its own investigation and determined that "the evidence is overwhelming that price discriminatory practices exist to such an extent that the survival of independent merchants, manufacturers, and other businessmen is seriously imperiled * * *." In addition, Congress had available a study by the Federal Trade Commission which showed that the rapid development of very large marketing organizations were in many cases supported by preferential discounts and rebates that these organizations had coerced from their suppliers. Congress, in passing a strengthened section 2, was simply reasserting that there must be an equal opportunity to compete if the free enterprise system is to function. Coerced preferential discounts crippled the system and would not be permitted.

As far as the retail pharmacy field is concerned, we are here to testify that the facts existing today, even against the backdrop of the strengthened section 2, demonstrate the pernicious nature of the evil which the act is intended to prevent and the necessity for its enforcement.

In recent years the number of retail drug chains has grown at a rapid rate. Some, if not all, of this growth is due to the same type of abuses previously documented in 1936. The use of cost cutting by providing limited services and carrying a limited inventory has aggravated this situation forcing countless independent retail pharmacists out of business.

Another device used by the chains during the period in which any independent competition continues to exist, is the use of their

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pharmacies as loss leaders, thereby insuring a quicker demise of the independent pharmacist, who as a professional relies on the practice of a profession for a livelihood as opposed to using it as a sideline for the sale of pet foods, blankets, car batteries, and laundry products.

The fact that evidence of the pernicious effects of these practices banned by the act continues to exist requires an investigation of the enforcement of this act. In times past, the Federal Trade Commission has vigorously supported the principles of that statute. The Commission now only rarely enforces these statutes, but in effect through neglect, supports repeal of a statute it is obligated to enforce. Vigorous efforts by this subcommittee to stop this bureaucratic mockery of Federal law will certainly be appreciated by the small businesses, especially the owners of independent retail pharmacies which NARD represents.

More important, however, is the need to protect consumers who are victimized by predatory practices which are allowed to thrive when the FTC turns its back on the Robinson-Patman Act.

Thank you.

Mr. Woods. If the administration is serious about its call for less Federal regulation, we suggest it take a careful look at the activities of the Federal Trade Commission, which is today asserting the right to establish Federal regulatory standards in many areas historically handled by the States. The FTC's trade regulation rules, especially those impacting the professions like ours—pharmacy—are certainly inconsistent with the administration's deregulation agenda.

NARD agrees with the Senate Commerce Committee's finding "that the FTC has intruded unwisely on State prerogatives in these investigations and enforcement action." NARD also agrees with the prescribed remedy; namely, section 3 of S. 2499, the Federal Trade Commission Amendments Act of 1982. Likewise, we commend your efforts, Mr. Luken, and those of your colleague Mr. Lee, and the more than 200 cosponsors of your H.R. 3722, which would place a moratorium on such intrusions by the FTC.

Hopefully, with the removal of any authority for this duplicative activity, the Federal Trade Commission would reallocate some of its limited resources to enforcing the Robinson-Patman Act.

In our view, the key inquiry for the subcommittee is "what conceivable legal basis—not economic philosophy—permits Government to ignore enforcement of the Federal law?" The burden rests clearly with the violators who fail to uphold their sworn duty.

All of the evidence available to NARD indicates that the possibility for even greater abuses than those which resulted in passage of the act exist today in 1982. The number of organizations which possess the requisite buying power to demand and coerce preferential treatment is many times greater now than in 1936.

The Robinson-Patman Act is not a handout to small business. It does not provide a subsidy or guarantee of success. The act merely provides a method to insure the continuation of competition by the prevention of the abuse of economic power in the hands of large organizations.

In 1975 in similar hearings before this committee on Robinson-Patman, Congressman Pickle made the statement, which we agree with and endorse wholeheartedly, that "The Robinson-Patman Act has been repealed by bureaucratic ineptitude."

The subcommittee should recommend increased enforcement of this act by the Government. NARD recommends that funds be earmarked in the budgets of both the FTC and the Department of Justice for enforcement and that the heads of these agencies be required to explain to this subcommittee and their respective oversight and appropriation subcommittees their enforcement intentions with respect to this statute.

Concerning the Hospital Violation and Nonprofit Institution Act, NARD has in the past appeared before the House Select Committee on Small Business and discussed the unfair competition faced by independent pharmacists from the sale of prescription drugs by hospital pharmacies to nonhospitalized patients. Some of these hospitals have been using the Nonprofit Institutions Act as a shield from the Robinson-Patman Act.

With respect to the Nonprofit Institutions Act, the practice of selling drugs purchased at preferred prices to outpatients was found to violate the Robinson-Patman Act by the U.S. Supreme Court in the lead case of *Abbott Laboratories* v. *Portland Retail Druggists*. The Court decision only found that the Nonprofit Institutions Act exempted purchases by hospitals when the purchases were "for their own use." NARD believes that violations of the Supreme Court decision are numerous and impact every region of this country, irrespective of whether the community is rural, urban, or suburban. We request a special investigation of the particular policies and problems of these "nonprofit" hospitals to determine the extent to which these institutions are illegally competing with NARD members in violation of the Supreme Court's *Abbott* v. *Portland Druggist* decision. We suggest that this subcommittee go further and determine whether the Nonprofit Institutions Act should continue to apply to so-called "nonprofit" hospitals in light of the disappearance of the charity patient in hospitals.

More recently, hospitals affiliated with State or local governments have attempted to evade the requirements of the Robinson-Patman Act by claiming the act does not cover them, since purchases by government institutions are not covered by the act. NARD believes that the Court of Appeals opinion is clearly wrong, and that the Robinson-Patman Act does apply to purchases by Government institutions when those institutions are not purchasing for their own use but are operating in the private sector and competing directly with small business.

If the Supreme Court affirms the lower court opinion and finds that the Robinson-Patman Act does not apply to Government even when the Government operates as a business, then NARD believes that Congress ought to immediately consider legislation making it clear that purchasing advantages given to the Government apply solely when the Government is purchasing for its own account and do not apply when the Government purchases for resale in the private sector. Such legislation would be an appropriate measure for repealing the Nonprofit Institutions Act.

We have all heard the expression that the more things change, the more they remain the same. The Robinson-Patman issue is a classic example in point. Congressman Patman's speech at the 1936 convention of NARD, soon after the passage of Robinson-Patman, gives strong support to that point and remains as valid today as it was more than 40 years ago when he said:

> It is not right for all the small merchants of the country to pay for the concessions and subsidies that manufacturers have been granting to the large national corporate chains. This law is intended to change the system that has penalized the small buyers and subsidized large buyers, and the particular business that this law, calling for fair dealings will regulate, must be an awfully rotten business. This law will not destroy, injure or harm in any way any legitimate business, but it will prevent a few large, greedy selfish monopolists from placing a tollgate at every operation that leads to a retail sale to the customers.
>
> This law is directed against the unfair trader, the cheater, the chiseler, and the defrauder. It is intended to give equal rights to all and special privileges to none. It will place all dealers upon the same competitive floor, and not give any of them unfair advantage over the other.

Our members, sir, want to continue owning and operating their pharmacies, providing vital, personalized health-care services for each of our communities. NARD solicits the assistance of this committee in any mutual effort which will permit them to continue to control their own economic and professional destinies.

Once again, Mr. Chairman, on behalf of the independent retail pharmacies of this country, we want to thank you for the opportunity to address this critical issue under consideration by your subcommittee and offer our assistance in every way possible.

Thank you, sir.

[Mr. Woods' and Mr. Johnson's joint prepared statement follows:]

PREPARED STATEMENT OF WILLIAM E. WOODS, EXECUTIVE VICE PRESIDENT, AND JOHN A. JOHNSON, PRESIDENT-ELECT, NATIONAL ASSOCIATION OF RETAIL DRUGGISTS

I am William E. Woods of Easton, Maryland. I serve as Chief Executive Officer of the National Association of Retail Druggists. My associates this morning are John A. Johnson, our President-Elect, and John M. Rector, Director of Government Affairs.

The National Association of Retail Druggists (NARD) represents owners of more than 30,000 independent pharmacies, where over 75,000 pharmacists dispense more than 70 percent of the nation's prescription drugs. Together, they serve 18 million persons daily and provide nearly 90 percent of the Medicaid pharmaceutical services. NARD has long been acknowledged as the sole advocate for this vital component of the free enterprise system.

NARD members are primarily family businesses. They have roots in America's communities. The neighborhood independent druggist typifies the reliability, stability yet adventuresomeness that has made our country great.

As owners of independent pharmacies, our members are committed to legislative and regulatory initiatives designed to provide them a fair chance to compete. We especially appreciate the opportunity to appear before the Subcommittee to present testimony on Robinson-Patman, merger policy and their respective impacts on independent retail drugstores. We would like to express our special appreciation to the Subcommittee, its Chairman, and staff for the extraordinary cooperation that you have shown NARD in the planning of this important oversight hearing.

The independent community pharmacist of today is simultaneously a health care professional and a small businessperson. NARD and its members vigorously support the American free enterprise system which provides the only meaningful climate under which a small business can economically survive, have the opportunity to succeed through personal efforts, and perform an important and essential service to the community.

The independent pharmacist of today is called upon to serve a wide range of the health care needs of the community. This has come about in part with the growth of medical centers and the exodus of health personnel from the inner city and rural areas, leaving the independent pharmacist, as the last remaining health care professional in many communities.

Today, the neighborhood independent pharmacist, in addition to the crucial role of filling prescriptions, provides advice to customers on drug usage and interactions.

Many independent pharmacists now maintain patient drug profiles so that even though a patient is seeing more than one doctor for various ailments, the pharmacist can assist in advising the doctors on possible adverse drug reactions as well as provide a history of a patient's adverse drug reactions.

Many independent pharmacists provide delivery of prescription drugs, recognizing that many in the community served are the old and those too sick or enfeebled to make the trip to even a neighborhood facility. Additionally, the independent pharmacist provides emergency after hours service so that those in need of immediate assistance can find it within their own communities, at any time of day or night. As a corollary to the importance of making health care readily available to members of the community, the independent pharmacist has traditionally maintained a wide inventory of drugs permitting prompt filling of prescriptions. Likewise, our members are providers of non-institutionalized home health care assistance in both their Durable Medical Equipment and Health Supports and Appliances Departments.

The vital services which I have briefly described above are not provided by many of the pharmacies in the large chain drug and grocery store corporations owned by non-pharmacists. Few chains permit consultation between the pharmacist and the customer. Some have their prescription department open only part of the time that the rest of the store is open. One of the key methods of controlling cost by the chains is the maintenance if a limited inventory of prescription drugs. All of these measures may mean cost savings for the chains, but they are a disservice to the prescription holder.

MERGER POLICY

The Subcommittee, we understand, is interested in the views of independent druggists on the enforcement attitude of the government with respect to mergers and acquisitions.

As you know, mergers and acquisitions are examined by the government in accordance with Section 7 of the Clayton Act, which was enacted in 1950. The Act prohibits acquisitions, the effect of which, "may be substantially to lessen competition." The Clayton Act was passed to prevent anticompetitive conduct associated with concentrated industries by preventing concentration at its incipiency. While Section 1 of the Sherman Act only prohibits combinations that operate "in restraint of trade", Section 7 of the Clayton Act is deliberately more expansive and reaches acquisitions that "may" tend to substantially lessen competition. No certainty is required. If an acquisition "may" substantially lessen competition, the Clayton Act makes it unlawful. In accordance with this directive, Section 7 has been used effectively to promote competition by insuring the presence of an adequate number of competitors.

Recently, however, Section 7 has not prevented a wave of acquisitions involving the large retail drugstore chains. Companies such as Revco, Rite-Aid, Jack Eckard and Walgreen's to name a few, have reached their giant size not by internal growth but rather by acquiring other and often significant chains. Fewer and fewer corporate chains are controlling a greater and greater share of this nation's retail pharmacy business. This trend has seriously and adversely affected the ability of the small independent community pharmacies to compete. As a result, these pharmacies are being driven out of business by the predatory practices that some of these deep-pocket chains engage in.

For the most part, these acquisitions have proceeded without objection from the government. This seems to be a result of government antitrust policy that has redirected Section 7 enforcement so that only mergers with clearly identifiable anticompetitive consequences are challenged. While in the past, Section 7 has been used as a prophylactic device to prevent acquisitions that "may" affect competition in the future, now the government seems to challenge only acquisitions that pose immediate anticompetitive threats. Thus, despite the fact that Section 7 prohibits acquisitions that "may" substantially lessen competition, those charged with enforcing Section 7 of the Clayton Act seems to have replaced the word "may" with the words "will certainly."

This change in enforcement posture, we are told, is institutionalized in the new merger guidelines recently announced by the Department of Justice. These guidelines, which are used by the private sector to predict the likelihood of a government challenge to a merger, indicate a continued relaxation by the government in determining enforcement policy with respect to Section 7. The guidelines make it clear that the fact that an acquisition "may lessen competition" is no longer enough to provoke a government challenge. Much more is now required. Thus, policymakers have taken it upon themselves to amend Section 7 of the Clayton Act to eliminate its use as a vehicle to challenge anticompetitive conduct in its incipiency.

As stated earlier, independent pharmacists provide desperately needed services to their communities—service that is rarely provided by large corporate chains interested only in the bottom line. We are talking about an area essential to the quality of this nation's health. Thus, NARD believes that Congress should reaffirm the goals of Section 7 and stress that it is intended to prevent industry concentration before concentration reaches extraordinary high levels. Congress should clearly state that Section 7 should be invoked on the basis of probabilities, and that certainty has not and should not be required. NARD believes that active enforcement by the government of Section 7 would go a long way to preserving the independence of this nation's pharmacies.

ROBINSON-PATMAN

The Subcommittee is likewise interested in the importance of Robinson-Patman enforcement to the independent retail druggist. In our opinion, the failure to enforce or de facto repeal of the Robinson-Patman Act will make it impossible for many of the sick, poor and aged to obtain life-saving drugs where and when they are needed and will create havoc in the availability of retail pharmacy services to members of the community.

Many of NARD's members are in very small communities. These communities, nonetheless, are served by 2 to 4 pharmacies. If larger corporate chains are encouraged by non-enforcement of the Robinson-Patman Act to use their national buying power to induce price favors from drug companies and suppliers, the result will be the creation of pharmacy monopolies in these communities. In some areas it is even conceivable that a single chain drugstore will be left to serve several communities. This forecast is not difficult to make considering the predatory practices used by some of these chains today. These practices demonstrate that their chief concern is the development of store traffic—not service or health care delivery. These chains will use a prescription department as a loss leader just as quickly as they will sell antifreeze, maple syrup and Kosher pickles below cost.

What this means is not simply that in the place of 2 to 4 competing pharmacies there will then be only one, but that for the invalid there is no delivery service, for the mother with a sick child needing to fill a prescription in the middle of the night, there is nowhere to turn. For the elderly taking a variety of medications, this would mean there is no one readily available to discuss methods of administration or side effects. Thus, we are not talking simply about the loss of independent businesses and the resultant loss of competition, we are talking about the loss of very vital community services. Nor should we be unmindful of the last act in this dismal course of events. When the monopoly is complete and the independent service-oriented drugstore is driven out of business, you may be sure that the consumer will start paying higher prices.

Against this background of what we believe is a realistic portrayal of what happens when the Robinson-Patman Act is not enforced, let us consider for a moment how we come to be talking about the emasculation of a statute which has been in effect for nearly forty years. A statute which during that period has been variously described as the Magna Carta of small business and the Golden Rule.

As we understand the Administration's position, it is in favor of less government regulation. It feels that federal regulation has shackled competition. Let me say that the members of NARD applaud that goal. Let me also say that to the extent that this approach is applied to industries which have had entry and prices controlled by regulatory agencies, this might, after careful weighing of the original reasons for regulation, result in some competitive gains.

I think that it is necessary to focus on a few facts, which again would seem to be self-evident, but which have apparently, in the past decade, escaped recognition by the Department of Justice. All antitrust statutes are a form of regulation of the free enterprise system. In 1890 Congress recognized that for a healthy and vigorous economy some regulation of free enterprise was necessary. As a result, it passed the first antitrust law, the Sherman Act.

In 1912, the increasing concentration of business in the hands of the trusts was considered a sufficient threat so that both political parties ran on platforms supporting increased antitrust enforcement. In 1914, as a response to this problem, the Clayton Act was passed. There can be no question in anyone's mind that all of these statutes regulate the conduct of business. I believe that no one would disagree, however, that some regulation of business is necessary if we are not to have an economy in which all business is controlled by a few monopolists or oligopolists.

The basic philosophy behind these early antitrust statutes was a reaffirmation of this country's belief in a free enterprise system and a concern that competition within that system be limited to those acts and practices which would preserve for the long term a healthy competitive economy. Congress then and now saw little to be gained by the cartel systems adopted in many other free enterprise economies. A multiplicity of sources of products and services was seen as an incentive to innovation and better service at lower prices.

The critics of this Act do not seem to understand that the Robinson-Patman Act is an expression of this basic philosophy. The idea that the Robinson-Patman Act is some aberration in the stream of antitrust development is demonstrably false. The theory on which the Robinson-Patman act is based is the same theory supporting the Sherman Act and the Clayton Act. The evils which the Robinson-Patman Act addresses had been recognized as pernicious in another context as early as 1887. The creation of the Interstate Commerce Commission was the result of Congress' determination to end the practice of railroads giving preferential freight rates to favored shippers by means of rebates. Congress at that time felt that such discrimination was anticompetitive. The 1914 Clayton Act incorporated this concept into the antitrust laws.

The passage of the Robinson-Patman Act in 1936 was, therefore, not the response to a new evil, but an attempt to strengthen the regulation of a long-recognized evil. The 1936 Act was an amendment to the 1914 attempt to regulate the same problems. In passing Section 2 of the Clayton Act in 1914, which prohibited price discrimination, and in passing a strengthened Section 2 in 1936, Congress was stating that preferential treatment provided to large buyers because of the pressure which they can place on a seller are not practices which lead to the end sought by the antitrust laws. Such practices can only lead to further concentration of power and diminished competition.

The Robinson-Patman Act can probably best be understood as a prophylactic measure: If Congress did not prohibit the practices covered by the Act, it would only be a matter of time before the antitrust enforcement agencies were faced with monopoly or oligopoly situations requiring the application of other sections of the antitrust laws, such as Section 2 of the Sherman Act.

NARD believes that Congress' analysis in 1914 and 1936 was accurate. We believe that if the retail drug field is characteristic of the effect of the de facto repeal of this Act, it could eventually result in the wholesale demise of independent business and the rapid demise of independent retail pharmacies in both urban and rural areas. The end result in many areas would be a monopoly or duopoly situation controlled by some large out-of-state corporate chain drug store, little concerned with serving the community except to the extent that it has a positive effect on its corporate ledger.

When Congress was considering passage of the 1936 Act, it did not do so in a factual vacuum. Congress conducted its own investigation and determined that "the evidence is overwhelming that price discriminatory practices exist to such an extent that the survival of independent merchants, manufacturers, and other businessmen is seriously imperiled. . . ." In addition, Congress had available a study by the Federal Trade Commission which showed that the rapid development of very large marketing organizations were in many cases supported by preferential discounts and rebates these organizations coerced from their suppliers. Congress in passing a strengthened Section 2 was simply reasserting that there must be an equal opportunity to compete if the free enterprise system is to function. Coerced preferential discounts crippled the system and would not be permitted.

As far as the retail pharmacy field is concerned, we are here to testify that the facts existing today, even against the backdrop of the strengthened Section 2, demonstrate the pernicious nature of the evil which the Act is intended to prevent and the necessity for its enforcement.

When the Robinson-Patman Act was passed, there were very few chain drug stores. The largest then and still a giant today is the Walgreen chain. One of the findings of Congressman Patman's "Special Committee Investigating the American Retail Federation and Trade Practices of Big Scale Wholesale and Retail Buying and Selling Organizations and their Associations" which served as the basis for the passage of the Act was that there were 250 separate instances of special discounts, allowances and secret rebates to Walgreen Drug Company by various suppliers. Because of the Federal Trade Commission's almost nonexistent enforcement of the Act today, it would not surprise me to find similar abuses by large corporate chains if an investigation were undertaken at this time.

In recent years the number of retail drug chains is growing at a rapid rate. Some, if not all of this growth is due to the same type of abuses previously documented in

1936 against the Walgreen Drug Company. The use of cost cutting by limited services and carrying a limited inventory have aggravated this situation forcing countless independent retail pharmacists out of business. In the past years it has been estimated that 1,000 independent drug stores per year have been forced to close their doors. Another device of the chains, during the period in which any independent competition continues to exist, is the use of their pharmacies as loss leaders thereby ensuring a quicker demise of the independent pharmacist, who as a professional relies on the practice of a profession for a livelihood as opposed to using it as a sideline for the sale of pet foods, blankets, car batteries, and laundry products.

The fact that evidence of the pernicious effects of the practices banned by the Act continues to exist requires a review of the enforcement of this Act. Enforcement of the Robinson-Patman Act on the federal level has traditionally been vested in the Federal Trade Commission rather than in the Antitrust Division of the Justice Department. This division of responsibility is understandable since the Federal Trade Commission's Report to Congress in 1936 detailing the abuses of power by large purchasers was a significant factor in passage of the Act. In times past, the Federal Trade Commission has vigorously supported the principles of that statute. Unfortunately, this commendable wave of enforcement activity was reduced to little more than a drip in the past decade. The Commission now only rarely enforces this statute, but in effect, through neglect, supports repeal of a statute it is obligated to enforce. Vigorous efforts by this Subcommittee to stop this bureaucratic mockery of federal law will certainly be appreciated by the small business especially the owners of independent retail pharmacies which NARD represents.

More important, however, is the need to protect consumers who are victimized by predatory practices which are allowed to thrive when the FTC turns its back on the Robinson-Patman Act.

Lest we be accused of the same fault as the supporters of the de facto repeal, I would like to provide the Subcommittee with a recent example of the Commission's attitude toward this Act. In the course of its consideration of a proposed Trade Regulation Rule which would preempt the laws of 33 states and permit advertising of prescription drug prices, the Commission staff investigated the claim made by some opponents of the proposal that many of the price differentials which form the basis for the Commission's action resulted from illegal price preferences to chain drug stores. The investigation was done in the Portland area by the Seattle Regional Office of the Federal Trade Commission. The staff study supporting the trade regulation rule indicated that to the extent that price discrimination existed it did not fully explain the differentials and therefore the Rule should be adopted.

The Seattle Regional Office Report was obtained by NARD by filing a Freedom of Information Act Request with the Commission. It is clear from the expurgated copy of the report made available to NARD that the staff had discovered evidence of possible Robinson-Patman Act violations. Despite this, no action has been taken by the Commission to remove a cause of the price differentials which the Commission claims to have such great concern over that it is willing to preempt the legislatures and regulatory bodies of 33 states. It is hard to imagine a more concrete example of the Commission's aversion to the Robinson-Patman Act. If more concrete evidence is needed, however, one need only examine the Annual Reports to Congress by the Federal Trade Commission which detail the almost complete cessation of activity in this area by the Commission.

The Federal Trade Commission's refusal to enforce the Robinson-Patman Act indicates the same disdain for duly enacted legislation as the Commission's proposal to overrule 33 states with respect to duly enacted legislation and regulation dealing with prescription drug advertising. If the Administration is serious about its call for less federal regulation, we suggest it take a careful look at the activities of the FTC which is today asserting the right to establish federal regulatory standards in many areas historically handled by the states. The FTC's trade regulation rules, especially those impacting the professions like ours—pharmacy, are certainly inconsistent with the Administration's deregulation agenda.

NARD agrees with the Senate Commerce Committee's Finding "that the FTC has intruded unwisely on State prerogatives in these investigations and enforcement action." NARD also agrees with the prescribed remedy; namely, Section 3 of S. 2499, the Federal Trade Commission Amendments Act of 1982. Likewise, we commend your efforts Mr. Luken and those of your colleague Mr. Lee (NY) and the more than 200 cosponsors of your H.R. 3722 which would place a moratorium on such intrusions by the FTC.

Hopefully, with the removal of any authority for this duplicative activity, the FTC would reallocate some of its limited resources to enforcing the Robinson-Patman Act.

When the Robinson-Patman Act was passed in 1936, the increased protection afforded small business against the predatory practices of large organizations possessing vast economic power, and as the evidence indicated a willingness to use and abuse that power, independent pharmacists along with other small business interests, felt that once again Congress had demonstrated an ability to carefully balance the concept of free enterprise against the types of practices which if allowed to go unregulated threaten free enterprise. NARD continues to feel that way. In our view, the key inquiry for the Subcommittee is "What conceivable legal basis (not economic philosophy) permits government to ignore enforcement of the Federal law? The burden rests clearly with the violators who fail to uphold their sworn duty.

All of the evidence available to NARD indicates that the possibility for even greater abuses than those which resulted in passage of the Act exist today. The number of organizations which possess the requisite buying power to demand and coerce preferential treatment is many times greater now than in 1936.

The Robinson-Patman Act, like the other antitrust laws, assists all businesses to compete freely and fairly in the marketplace. The failure to enforce the Act allows large organizations to illegally use their size and power to compete unfairly by coercing and demanding preferential treatment from sellers.

We at NARD know that such flaunting of the law is not in the interest of the American public or the free enterprise system. The average American voter respects the law and expects government officials to enforce the law. Likewise, they do not want large organizations to get larger until the consumer was left in the retail pharmancy field not only without freedom of choice, but without vital health care services.

The Robinson-Patman Act is not a handout to small business. It does not provide a subsidy or guarantee of success. The Act merely provides a method to insure the continuation of competition by the prevention of the abuse of economic power in the hands of large organizations.

When the large nonpharmacist-owned chain drug corporation becomes a monopolist, I ask this Subcommittee whether supposed cost savings will be distributed to the consumer or to the stockholders of the corporations owning the chain. I ask this Subcommittee whether the chain drug store which has already so clearly demonstrated its concept of insensitivity to community service and needs by reducing inventories, eliminating emergency and home delivery, and by isolating the pharmacist from the patient—all in the interest of profit—will not exact the monopoly profit which history teaches us is the reward of the successful monopolist

The Subcommittee should recommend increased enforcement of this Act by the government. The FTC has been too ready to say that private enforcement provisions mean that government action is not required. The costs of litigation in terms of time and money mean that the small independent businessman will be long gone and forgotten before any judicial decision on the merits is reached. Since the Federal Trade Commission in the past has shown itself so patently opposed to enforcement, NARD recommends that funds be earmarked in the budgets of both the FTC and Department of Justice for enforcement and that the heads of these agencies be required to explain to this Subcommittee and their respective oversight and appropriation committees their enforcement intentions with respect to this statute.

Hospital Violation and the Non-Profit Institution Act

NARD has in the past appeared before the House Select Committee on Small Business and discussed the unfair competition faced by independent pharmacists from the sale of prescription drugs by hospital pharmacies to non-hospitalized patients. These hospital pharmacies have been obtaining drugs at prices far below those paid by independents, and have sold these drugs to patients otherwise served by independents. Some of these hospitals are using the Non-profit Institutions Act as a shield from the Robinson-Patman Act. Others are claiming that they are exempt from the Robinson-Patman Act because of their affiliation with state or local governments.

With respect to the Non-profit Institutions Act, the practice of selling drugs purchased at preferred prices to out-patients was found to violate the Robinson-Patman Act by the Supreme Court in the lead case of *Abbott Laboratories* v. *Portland Retail Druggists.* The Court decision only found that the Non-profit Institutions Act exempted purchases by hospitals when the purchases were "for their own use." NARD believes that violations of the Supreme Court decision are numerous and impact every region of the country, irrespective of whether the community is rural, urban, or suburban. We request a special investigation of the particular policies and problems of these "non-profit" hospitals to determine the extent to which these institutions are illegally competing with NARD members in violation of the Supreme

Court's *Abbott* v. *Portland Druggist* decision. We suggest that this subcommittee go further and determine whether the Non-profit Institutions Act should continue to apply to so-called "non-profit" hospitals in light of the disappearance of the charity patient.

Hospital violation—Government competition

More recently, hospitals affiliated with state or local governments have attempted to evade the requirements of the Robinson-Patman Act by claiming the Act does not cover them, since purchases by government institutions are not covered by the Act. The Supreme Court is currently reviewing a Court of Appeals decision, which held that a government affiliated hospital was able to purchase pharmaceutical products at preferred prices even if the hospital intended to sell those pharmaceutical products in the open market against directly competing independent pharmacists. NARD believes that the Court of Appeals opinion is clearly wrong, and that the Robinson-Patman does apply to purchases by government institutions when those institutions are not purchasing for their own use but are operating in the private sector and competing directly with small busineess. If the Supreme Court affirms the lower court opinion and finds that the Robinson-Patman Act does not apply to government even when government operates as a business, then NARD believes that Congress ought to immediately consider legislation making it clear that purchasing advantages given to government apply solely when the government is purchasing for its own account, and do not apply when the government purchases for resale in the private sector.

Finally, we would like to emphasize that failure to enforce this statute has affected many industries.

Concentration in all of these industries will increase. The elimination of independent business by unfair means concerns NARD and its members as supporters of the free enterprise system. With respect to the retail drug field, however, the problem is not only one of maintaining competition consistant with the theories underlying all of the antitrust laws since the passage of the Sherman Act in 1890, but the preservation of the last health care professional in many neighborhoods. When out-patient care is being stressed, action which will result in the removal of thousands of health care professionals from within communities seems particularly incongruous.

We have all heard the expression that the more things change, the more they remain the same. The Robinson-Patman issue is a classic example in point. Congressman Patman's speech at the 1936 convention of NARD, soon after the passage of the Robinson-Patman Act, gives strong support to that point and remains as valid today as it was more than 40 years ago:

"It is not right for all the small merchants of the country to pay for the concessions and subsidies that manufacturers have been granting to the large national corporate chains. This law is intended to change the system that has penalized the small buyers and subsidized large buyers, and particular business that this law, calling for fail dealings will regulate, must be an awfully rotten business. This law will not destroy, injure or harm in any way legitimate business, but it will prevent a few large, greedy selfish monopolists from placing a tollgate at every operation that leads to a retail sale to the customers.

This law is directed against the unfair trader, the charter, the chisler and the defrauder. It is intended to give equal rights to all and special privileges to none. It will place all dealers upon the same competitive floor, and not give any of them unfair advantage over the other."

CONCLUSION

Our members are major factors in the stability of their hometowns. They are not newcomers or employees on the ladder to stardom in some distant chain's hierarchy. They know their employees and customers. Often they provide the success models or symbols to young, and not so young, of proof that the American dream of ownership and hard work is still what this country is all about. They support religious endeavors and other local institutions. In other words, they are leaders with a stake in the community who have, and are demonstrating daily, a commitment to local and national pride. They learned long ago that "Big is not necessarily better!"

All that they epitomize is under fire. Regretfully, the Federal Government (through actions or inaction) is firing most of the shots!

Uppermost, our members want to continue owning and operating their pharmacies, providing vital, personalized health-care services for each of our communities. NARD solicits your assistance in any mutual effort which will permit them to continue to control their own economic and professional destinies.

Once again, Mr. Chairman, on behalf of independent retail pharmacy, we thank you for the opportunity to address the critical issues under consideration by your Subcommittee.

Mr. **Luken**. Mr. Daub, would you like to lead off?

Mr. **Daub**. Mr. Johnson, I'm going to make an assumption. If you break that word down in its logical parts, you know, you can take a big risk, but I might speculate that Assistant Attorney General Baxter, if he were here now, might say that the chain drug stores and their formation are beneficial to the consumer in that they might tend to drive prices down. I wonder how you might respond to that, given your experience in the marketplace.

Mr. **Johnson**. I think that one of their predatory practices is to eliminate small independent drug stores. To give an example I don't know that we can press it too far, but in Denver a large chain has pretty well eliminated all independent pharmacies with that type of practice. Now, when that is done and we eliminate all the independents, then we find that in most of those areas the price of legitimate drugs rises.

Mr. **Daub**. You know, if I am trying to be Morris West, for a minute, and a devil's advocate and say there would be nothing to the argument then that legitimate buying on volume or merchandising in volume in the drug industry might, in fact, have a proper cost-benefit relationship to the customer served, which as you know is an exemption under Robinson-Patman—you know, you can discount and you can mass volume relate if it's legitimate, if the customer is actually getting an appropriate service rendered and it is not actually a predatory practice, as you suggested, to drive the small guy out of business.

Mr. **Johnson**. Well, it depends upon how you look at that. For instance, I have an ad here that was placed out for Labor Day, in which the prices on these items were below what I could possibly buy them for, by as much as 20 percent. If the manufacturer is allowing that large company that price, I should have that price, too. I should be able to compete with him at his level. I'm not competing with anybody on a normal level. But if a guy is buying something 20 to 30 percent below what I can buy it for, in any way, shape or form, there is no way I can——

Mr. **Daub**. So you would say it would be an abuse of the discount for volume purchase concept—

Mr. **Johnson**. That's right.

Mr. **Daub**. That is exempt?

Mr. **Johnson**. That's right. But, it is an abuse in this type of case. Anybody can compete if they can have the same privileges.

Mr. **Daub**. That's really the point I wanted. I think that's all I have, Mr. Chairman.

Mr. **Woods**. Mr. Daub, I think it is even more important in the case of prescription drugs. Many people do not go 20 miles to get prescriptions. If you carry the proposition discussed to the ultimate extreme, there could be one store for the whole State, or one store for an area of 20 miles. Maybe you could do that for cars, but people who need health services wouldn't have them available.

Mr. Johnson mentioned Denver and it reminds me of something else. The medicaid department in Colorado did a survey to see who was filling the prescriptions. Of all Medicaid prescriptions 85 percent in the State of Colorado are filled by the independents. The chains won't fill them. If the chains destroy the independents, the medical service, the pharmacy service will be denied a very large segment of the population.

Mr. DAUB. Let me follow up on that one point.

I serve on the Long Term Health Care Subcommittee of the Select Committee on Aging. I have been fascinated in the last couple of months to read about the real outreach that is occurring by independent pharmacies across the country. I think it may be just this same program. Are you aware as to whether or not the large chains are doing the same thing or not?

Mr. WOODS. At the risk of not intending to be too bold about it, my impression of most of the large chains is that the prescription customer is the first in line and last to get waited on. The services that are provided by those nonpharmacist owned corporate chains that are merchandisers at heart, the service they provide doesn't compare in any way with what John Johnson provides to the customers that come in his store.

Mr. DAUB. But my question is, Do you know if any of the large chains are doing the home health type prescription planning programs with physicians in small towns and in these rural areas? Do you know if they are or not?

Mr. WOODS. I believe that some chains have opened something like health support and appliances types of activities, including durable medical equipment.

Mr. DAUB. Do they make house calls?

Mr. WOODS. I think you have here in Washington, D.C. an example of one that is not successful because they don't provide the service.

It is also interesting, I think, that the National Association of Retail Druggists has developed and has now in place a home health care pharmacy department to do just what you are talking about. We have a health support certification program since 1976 that has certified some 4,000 facilities and fitters representing independent drug stores and related personnel to provide these services.

Mr. DAUB. I might suggest, sir, that maybe big isn't better, that maybe little can survive quite well in many ways by this very unique approach which helps to sort of meet a real demand out there in the marketplace.

Mr. WOODS. That's a good observation. We are providing these services.

Mr. DAUB. Thank you, Mr. Chairman.

Mr. LUKEN. Mr. Johnson, I am not going to try to make you an expert on the Robinson-Patman Act—unless you want to be—and I certainly am not. But I think we ought to try to struggle through this a little bit in detail on the question of what you might perceive as a volume discount. As I understand it, under Robinson-Patman, if that discount is legitimately related to the cost of the provider, then it is legal under Robinson-Patman. Now, I didn't know, in your answer to Mr. Daub's question, whether you were reflecting that or would you want to expand upon that?

I assume that if your competitor or whoever it was you cited there, or competitor to the people you represent, is selling it at 20 percent below what you can buy it for, I assume that that's not a legitimate discount based upon the variable cost of providing the product to the chain as opposed to providing the product to the retail druggist. But obviously there would be differences—maybe considerable differences—to the volume buyer, depending upon the distribution and other aspects of the actual sale of the product once it is manufactured.

Mr. JOHNSON. You speak to a problem that we are not quite able to understand, as retailers. One of the products on the slip here is something, as far as I know, that is unavailable except through wholesale levels. If it is unavailable at the wholesale levels to me, it should also therefore must be to them, according to the rules of the company. We can't buy it directly from the manufacturer.

Mr. LUKEN. You can't buy a product?

Mr. JOHNSON. This product that I have here.

Mr. LUKEN. You can't buy it from the manufacturer?

Mr. JOHNSON. I can't buy it from the manufacturer. I buy it through a wholesaler. If that is the case, and this gentleman is buying it from a wholesaler, my best level of cost, for instance, in this particular case is $4.08 from any wholesaler, and he is selling it at $3.77, something is amiss somewhere. He could be selling it below cost. It's the hottest selling item in the area as far as skin care is concerned. If so it would be an example of a predatory pricing policy. I just don't think that's what he is doing. Sure, I can't prove that, and I can't tell you—I feel it's a violation. If I could buy it at $3.77, I would be willing to compete with him at $3.77.

Mr. LUKEN. As far as you know, their marketing system is that it is only distributed through wholesalers?

Mr. JOHNSON. Wholesalers.

Mr. LUKEN. Doesn't the wholesaler have a variable price, depending upon quantity?

Mr. JOHNSON. His variable price to me, for instance, if I buy one, it is $4.39. If I buy it in the quantity that we normally buy it from anyplace else, it is $4.09. In other words, we do have a discount, roughly 10 percent, and I get 11 percent, I think, because of my volume. But that is the ground rule.

Mr. LUKEN. And they're selling it for how much?

Mr. JOHNSON. $3.37 versus my $4.09.

It just appears to me there is something wrong. Supposedly, the only way you can buy it is through a wholesaler. I feel that there is a violation.

Mr. LUKEN. Are you having any trouble getting attention to that charge of a violation from the FTC?

Mr. JOHNSON. I have never brought a charge. This came up just before we testified. This happened this Labor Day.

Mr. LUKEN. Well, in similar cases, or in any kinds of situations you have encountered——

Mr. WOODS. Mr. Chairman, you are really dealing with the nub of the problem that we have had here for a number of years. We were before Congressman Gonzalez committee and had hearings on this several years ago, and prior to that with Mr. Hungate.

In the drug area—I am not sure this is true with all the others—it is almost impossible to know what these people are being charged, what the manufacturers charge them. This may not be the problem in other industries or businesses. About the only way we know what hospitals are paying—and I think we can find out those prices easier than we can the corporate chains—is for an invoice to be mistakenly sent to one of our stores.

Now, the committee is in a far better position to find out what these companies are charging than we are. Whether it be by affidavit, subpena, or a simple request for information "What have you charged in the last month, 2 months, or 1 year? What are the price differences you have charged?" I think the findings would be astounding. I am talking about across-the-board and prescription products only. But it is impossible for us to know what they're charging.

Mr. LUKEN. Perhaps we can get some of this information from the Federal Trade Commission witness and from the Department of Justice, or we could request it.

Mr. WOODS. We would certainly welcome it. A review or oversight hearing is very important. The kind of investigation they had in 1936, involved the securing of information and statistics that we haven't been able to get in the last 10 years. It should be available to this committee to make the kind of judgment and decisions that I know you want to make.

Mr. LUKEN. We certainly can understand that you are not in a position to make those investigations. You would have to hire a private agency, to make even one investigation, and you would not have the comparable information. So that is certainly part of our reason for inquiring, as to just what information is available and what we can make available. So we will pursue that with the FTC and the Justice Department. Is there anything else you want to add at this time?

Mr. DALTON. Mr. Chairman, if I may ask just one question.

Mr. LUKEN. Mr. Dalton.

Mr. DALTON. To go back to Denver for a moment, you talked about the chains driving out the independents through the predatory prices. Do you have any information which you might be able to give us which would show that since the independents have been driven out the prices have risen?

Mr. JOHNSON. I don't have that at this point, but we can sure ask for it from the people out there. One of our members of the board is a Coloradan who has brought this to our attention, and I will sure ask him to get what information he can on that particular matter.

Mr. WOODS. We will make every effort to secure that information and supply additional information to the committee.

Mr. DALTON. By newspaper ads and things like that, if you could show a before and after relationship in the same year in which the mergers or acquisitions or dissolutions occurred, that would be helpful.

Mr. JOHNSON. We will sure give it a shot.

Mr. WOODS. One comment I would make. If the FTC was really interested in enforcing Robinson-Patman they would have already done that, Mr. Daub, and I don't see any evidence that they have ever done it.

Mr. DAUB. Maybe we need to help them.

Mr. LUKEN. Have you seen any contrary evidence?

Mr. WOODS. Yes, relaxation.

Mr. **Luken**. All right. We thank you very much, gentlemen.

Now we are summoned for a very important vote, going into the Committee of the Whole, so it should not take us long to vote on that. It won't take too much contemplation on that issue. So we will be back within 7 minutes or so.

[A short recess was taken.]

Mr. **Luken**. All right, Mr. Borda? You have given us your written testimony, right?

Mr. **Borda**. Yes, sir, I have.

Mr. **Luken**. Without objection, it will be received into the record of the committee. You heard the testimony of the others who have already talked to us about some similar situations, and observations and complaints.

So perhaps you could tell us anything that is in your testimony that has not already been covered, any points that you want emphasized, and I am sure you will want to describe to us the meeting which you had with Mr. Baxter.

TESTIMONY OF EDWARD T. BORDA, PRESIDENT, ASSOCIATION OF GENERAL MERCHANDISE CHAINS, INC.

Mr. **Borda**. All right. So I will try to move through this very quickly, and then we will get to the meeting with Mr. Baxter, and other meetings that we have had.

Mr. Chairman, members of the subcommittee, I am Edward T. Borda, president of the Association of General Merchandise Chains. AGMC represents the Nation's discount and variety general merchandise retail industry. I appreciate this opportunity to share with the subcommittee the profound concerns that general merchandise retailers have because of the refusal of the Antitrust Division to enforce the existing law against vertical price fixing.

AGMC represents 125 retail companies operating discount stores, variety stores, dollar stores, and family center stores. While AGMC members range in size and include large national or regional retail chains, nearly three-quarters of our members meet the definition of small business currently proposed for our industry by the Small Business Administration.

The issue of resale price maintenance, that is coercion of distributors or retailers to sell merchandise only at a fixed price, unites the member of our industry, whether they operate a single store or a major chain.

The Antitrust Division's announced plans to ignore, and to even try to overturn, the legal principle which outlaws resale price maintenance are seen by our price-competitive members as a direct threat to their continued existence.

We strongly urge the subcommittee to take every step in its power to see to it that the legal safeguards against resale price maintenance are upheld, not subverted, by the Nation's top antitrust officials.

Let me begin by briefly sketching the development of the long-established legal ban against resale price maintenance. We know that since 1911, a long line of Supreme Court cases has held that coercive efforts by manufacturers or others to dictate the prices at which products could be sold by independent distributors or retailers are so inherently anticompetitive as to be an automatic, or per se, violation of Federal antitrust law.

In the 1930's, Congress created an exception to this rule for so-called State fair trade laws, which authorized restrictions on retail price competition. These State laws were widely and persuasively criticized by consumers, many retailers, and Federal antitrust officials in both Democratic and Republican administrations.

Extensive economic evidence presented in congressional hearings showed that State-sanctioned resale price maintenance drives up consumer prices, narrows consumer choices and harms the efficiency of the Nation's distribution system. It was specifically demonstrated that, far from helping small businesses, resale price fixing is particularly harmful to small enterprises.

After years of consideration and development of a very full evidentiary record, Congress responded by enacting the Consumer Goods Pricing Act, which effectively abolished State fair trade laws, finding them to be anticompetitive and inflationary.

Let me emphasize that the economic and competitive case against resale price maintenance has been convincingly established, as I have noted in my prepared statement.

Further, the per se illegality of resale price maintenance has been repeatedly affirmed by the Supreme Court since 1911. And indeed, that Court noted in a 1977 decision that Congress had endorsed the per se rule by repealing the antitrust immunity for State fair trade laws.

And, as I mentioned earlier, prohibition on price fixing from above has been a cardinal principle of antitrust law under every administration of the past several decades.

Recently, however, several top Federal antitrust officials have begun a campaign to overturn the per se rule of illegality for resale price maintenance. The Federal Trade Commission Chairman James Miller has argued in favor of abandoning the per se rule and both the Agency's Bureau of Competition and its Bureau of Economics are at work on various critiques of the per se rule.

While agency staff is developing some theoretical alternatives to the per se rule, the Commission itself remains on the record in support of the per se rule.

In recent months, at the FTC, there has been a fair amount of enforcement activity related to resale price maintenance, primarily through decisions and consent orders in cases dating back some years.

However, at the Antitrust Division of the Department of Justice, Assistant Attorney General William Baxter and staff have on numerous occasions announced their disagreement with the per se rule, and begun a twofold assault on this important safeguard for retail price competition.

First, the Antitrust Division's Chief has announced that he will not enforce the legal prohibition against resale price maintenance except when, according to his own economic views, it would be desirable to do so.

Second, the Antitrust Division has announced that it plans systematic amicus participation through its private action program in selected private antitrust lawsuits for the purpose of overturning the current per se illegality of resale price maintenance.

This effort runs directly counter to the intent evident in Congress' repeal of fair trade laws, and the strong approval there of the per se doctrine. If allowed to proceed, the private action program will permit the Antitrust Division to devote its resources to overturning, not upholding, the will of Congress.

AGMC strongly believes that any departure from present law as radical as allowing vertical price fixing must come only after action by Congress, with all parties given an opportunity to be heard and a full consideration of the impact that such a fundamental change would have on consumers, the economy, and the Nation's system of distribution.

The evidence before Congress when it outlawed fair trade laws showed that resale price fixing does not help, but may actually harm small enterprises. One persuasive study compared the experience of retailers in fair trade and nonfair trade areas over a 25-year period from 1933 to 1958.

In that study, Dr. Stewart M. Lee found that:

> Retailers did not fare better or worse in States without fair trade than in those that had fair trade legislation. It would seem that, if anything, the nonfair trade States showed a slight advantage over the others.

Dr. Lee's study, published in the Journal of Retailing in the spring of 1965, also found that:

> The best data available do not support the contention that the enactment of fair trade laws lessens the number of retail failure or bankruptcies or increases the number of retail stores. Whatever effect they have apparently has been slight and in an opposite direction to the one claimed by proponents of fair trade.

We move now to the effect that resale price fixing would have on consumer prices. Restricting price competition naturally leads to higher prices to consumers, and small businesses are, of course, consumers just like you or me.

Some idea of just how serious a threat this is can be had by looking at the wide variety of Government studies that estimated the costs to the Nation's consumers from price maintenance under the old State fair trade laws. These studies consistently found that allowing resale price maintenance means billions of dollars each year in higher consumer prices. In 1956, for example, the Antitrust Division surveyed consumer prices on numerous products and found that, in States with resale price maintenance agreements sanctioned under fair trade laws, consumer prices for fair traded goods ranged from 19 to 27 percent higher than in States without fair trade laws.

Another Antitrust Division survey in 1970 examined the prices of 78 fair traded items during the week of June 26, 1970, in 57 discount and department stores in 10 cities in four States without fair trade laws. It found prices ranging anywhere from 0.2 to 27.4 percent below the price enforced by manufacturers in fair trade States.

Other evidence in the legislative history leading up to congressional repeal of fair trade laws demonstrates the price-boosting effect that resale price maintenance produces.

A 1974 survey by the Marketing Science Institute examining the impact of repeal of fair trade laws in Rhode Island found price decreases in four of nine product lines surveyed. The reductions averaged between 20 and 40 percent; all but one of the nine manufacturers reported no sales decline after repeal of the State fair trade law. British and Canadian reports likewise found beneficial effects from repeal of the fair trade laws there.

There is ample evidence that resale price maintenance schemes drive up the cost of goods to consumers, but higher consumer prices are not the only drawback of resale price maintenance. The practice also narrows consumer choices. Our economic system is based on the belief that the free choices of consumers in a competitive marketplace will determine the most efficient and accurate allocation of goods and services. Retail price fixing robs consumers of their freedom to comparison shop for the combination of price, convenience, and service that best matches their needs.

While some manufacturers will attempt to justify a higher fixed price as needed to pay for a variety of product-related services and promotions, this really misses the central point. It should be consumers themselves, not the manufacturers and not the Government, who decide what is important to them.

Fixing retail prices, in essense, amounts to a hidden tax on all consumers to pay the costs of manufacturer-desired services after promotion, whether or not consumers desire or require them. This is totally out of keeping with a genuine commitment to free marketplace competition.

If current safeguards against resale price maintenance are dropped, goods whose prices at retail remain under the manufacturer's control will become less available, since retail outlets whose marketing strategy centers on price competition are less likely to carry those price-controlled goods.

So a ban on price competition in the marketplace will not only foreclose a consumer's ability to shop for a product on the basis of price, but will also lead consumers to experience greater inconvenience in finding the product they desire even at the manufacturer-set price.

Retail price competition plays a significant role in fighting inflation. In the intensely competitive retail marketplace, market forces acting freely promote efficiency in the Nation's distribution system and offer consumers a full array of goods at competitive levels of price and service.

I will note in passing that even though the retailing industry is generally subject to the same types of increases in operating costs as most other businesses—such as labor, taxes, interest, energy, rents, insurance—vigorous price competition and the knowledge that their customers are free to seek out the best values have led retailers to hold down merchandise prices.

It is no coincidence that, over the past 15 years, price increases in the highly competitive general merchandise retail industry have been only about half as much as increases in the overall cost of living, as measured by the Consumer Price Index.

Since retail price fixing is designed to eliminate competition among retailers, it will naturally result in a higher cost of living. At a time when controlling inflation and interest rates are identified as top economic priorities, reduced price competition would work against those key elements in the national recovery program.

Given these serious economic implications, the Department of Justice should carefully measure and thoroughly analyze the impacts that renewed resale price maintenance would have on consumers, distributors and inflation-fighting efforts.

Such a review should not be limited to the theoretical considerations, but also ought to include a comprehensive analysis of all major economic issues involved, including such direct impacts as sharply higher consumer price levels, lower sales volumes, increased general inflation rates and consequent impacts on small business, the Federal budget and the national economy.

The inflationary effect on resale price fixing, incidentally, has been acknowledged by the Federal antitrust officials who are seeking to weaken the current safeguards for retail price competition.

You have all noted, and I believe you have commented on the recent Washington Post article that highlighted some of Mr. Baxter's views on this subject.

While AGMC has expressed its concern directly to the Antitrust Division over the heavy price that the Nation's consumers, small businesses and retail system will have to pay if Mr. Baxter succeeds in bringing back resale price maintenance, to date, we have not heard from them even a ball park estimate of the costs of making this major policy change.

Advocates of resale price maintenance overlook one basic fact: Resale price maintenance does not guarantee that manufacturer-desired promotion or services will be provided in all cases; it just acts to fix the retail price.

Moreover, manufacturers have a wide variety of devices, such as promotional allowances, services contracts and the like, for insuring that retailers selling their products take part in desired promotional or service activities. Unlike price fixing, these incentives are targeted to achieve a specific objective and are not inherently anticompetitive.

Our industry regards as vital the continued ability to determine the retail price levels for the merchandise it has bought and paid for.

Price is a central concern for any business enterprise, but in no other quite so clearly as in the retail industry. Every analysis points to retailing as the most highly competitive segment of the economy. A merchant's ability to determine what merchandise to offer and what prices to ask are absolutely essential to healthy retail competition.

Although retail firms compete with each other in many ways—merchandise selection, location, convenience, hours of operation, availability of credit, store facilities, and a wide range of store policies and services—shoppers and merchants both agree that the most important aspect of retail competition is, overwhelmingly, price. By removing the ability of competitors to engage in price competition, resale price maintenance strikes at the heart of the retail industry. Moreover, the merchant is the party best positioned in the marketplace to respond to, and to anticipate, consumer desires. The merchant, not the manufacturer, is the most informed and efficient decisionmaker as to the appropriate retail price.

By removing a merchant's ability to adapt merchandise prices to marketing strategy, overall demand, and consumer preferences, resale price maintenance severely discourages the development of more efficient companies and retailing methods.

Like other mechanisms designed to hinder free marketplace competition, such as Government-imposed price controls, resale price maintenance will produce unwanted effects such as distortions in the economy and lower productivity.

As experience with fair trade laws proved, resale price maintenance harms small business, drives up the price of consumer goods, narrows consumer choices, and harms the efficiency of the Nation's system of distribution. Any policy change favoring fixed resale prices will fuel inflation and harm economic recovery efforts.

The freedom to determine retail prices for merchandise is essential to the Nation's retail industry, which is best placed to judge consumer demand and preferences. Resale price maintenance does not work to insure provision of the services which manufacturers may desire; better alternatives are available. Resale price fixing merely fattens product margins and prevents wholesalers from obtaining, and retailers from offering, lower prices for consumers.

The long-established ban on resale price maintenance is a crucial safeguard for consumers, distributors, and the competitive free marketplace. Any retreat from this fundamental policy of Federal antitrust law would have severe economic consequences. Antitrust officials should not seek to overturn the per se rule, but rather should enforce it in line with congressional intent and clear judicial precedent.

The Assistant Attorney General has the sworn duty to uphold and enforce settled antitrust law, regardless of his personal views. If he disagrees with that law, his proper course is to come to Congress with a legislative proposal, not to refuse to enforce that law or to participate in private lawsuits in order to overturn the law affirmed by both Congress and the Supreme Court.

Thank you once again for this opportunity for AGMC to share with the subcommittee our profound concerns over the Antitrust Division's refusal to enforce, and the announced intention to undermine, the well-settled law prohibiting resale price fixing. We hope that the subcommittee will continue to work to preserve this important competitive safeguard.

[Mr. Borda's prepared statement follows:]

PREPARED STATEMENT OF EDWARD T. BORDA, PRESIDENT, ASSOCIATION OF GENERAL MERCHANDISE CHAINS, INC.

I am Edward T. Borda, President of the Association of General Merchandise Chains, Inc. (AGMC), which represents the nation's discount and variety general merchandise retail industry. AGMC appreciates this opportunity to share with the Subcommittee the profound concerns that general merchandise retailers have because of the refusal of the Antitrust Division to enforce the existing, long-standing legal ban against vertical price-fixing.

AGMC represents 125 retail companies operating discount, variety, dollar and family center stores. While AGMC members range in size and include large national or regional retail chains, nearly three-quarters of our members meet the definition of "small business" currently proposed for our industry by the Small Business Administration.

The issue of resale price maintenance—that is, coercion of distributors or retailers to sell merchandise only at a fixed price—unites the members of our industry, whether they operate a single store or a major chain. The Antitrust Division's announced plans to ignore, and to even try to overturn, the legal principle which outlaws resale price maintenance, are seen by our price-competitive members as a direct threat to their continued existence. We strongly urge the Subcommittee to take every step in its power to see to it that the legal safeguards against resale price maintenance are upheld, not subverted, by the nation's top antitrust officials.

INTRODUCTION

Let me begin by briefly sketching the development of the long-established legal rule against resale price maintenance. Since 1911, a long line of Supreme Court cases has held that coercive efforts by manufacturers or others to dictate the prices at which products could be sold by independent distributors or retailers is so inherently anticompetitive as to be an automatic, or per se, violation of Federal antitrust law.

In the 1930's, Congress created an exception to this rule for so-called state "fair trade" laws, which authorized restrictions on retail price competition. Those state laws were widely and persuasively criticized by consumers, many retailers, and Federal antitrust officials in both Democratic and Republican Administrations. Extensive economic evidence presented in Congressional hearings showed that state-sanctioned resale price maintenance drives up consumer prices, narrows consumer choices and harms the efficiency of the nation's distribution system. It was specifically demonstrated that, far from helping small businesses, resale price-fixing is particularly harmful to small enterprises.

After years of consideration and development of a very full evidentiary record, Congress responded by enacting the Consumer Goods Pricing, Act, which effectively abolished state "fair trade" laws, finding them to be anticompetitive and inflationary.

Let me emphasize that the economic and competitive case against resale price maintenance has been convincingly established. As former Assistant Attorney General Thomas E. Kauper stated in 1975 testimony supporting repeal of "fair trade" laws:

"All but a very few of the numerous economists and marketing experts who have studied the problem believe that the benefits of resale price maintenance are not sufficiently large to offset such deficiencies as higher prices, reduced consumer choice, and the suppression of marketing innovation."

Professor Phillip C. Neal, Dean of the Chicago Law School, while serving on a 1968 Antitrust Task Force, reported:

"The case against resale price maintenance has been made so often and so persuasively that we think no further elaboration is necessary. We recommend repeal of the antitrust exemption for resale price maintenance."

Repeal of "fair trade" law was also supported in testimony by Assistant Attorney General Kauper. He termed the privileged status of resale-price fixing under "fair trade" laws: "* * * an unjustified exception in the policy of the antitrust laws, which call for the determination of price by the unfettered interplay of supply and demand in the marketplace. Repeal of this anachronism will significantly aid the effort against artificially high prices." He also noted that resale price maintenance facilitates horizontal price-fixing.

The per se illegality of resale price maintenance has been repeatedly affirmed in a line of Supreme Court cases dating back to 1911, and the Supreme Court noted in a 1977 decision that Congress had endorsed the per se rule when it repealed antitrust immunity for state "fair trade" laws. As mentioned earlier, the prohibition on price-fixing from above has been a cardinal principle of antitrust law under every Administration of the past several decades.

ANTITRUST OFFICIALS ATTACK ESTABLISHED BAN ON RESALE PRICE FIXING

In recent days, however, several top Federal antitrust officials have begun a campaign to overturn the per se rule of illegality for resale price maintenance. FTC Chairman James Miller has argued in favor of abandoning the per se rule and the Agency's Bureaus of Competition and Economics are at work on various critiques of the per se rule. While agency staff is developing some theoretical alternatives of the per se rule, the Commission itself remains on the record in support of the per se rule. In recent months at the FTC, there has been a fair amount of enforcement activity related to resale price maintenance, primarily through decisions and consent orders in cases dating back some years.

However, at the Antitrust Division of the Department of Justice, Assistant Attorney General William Baxter and staff have on numerous occasions announced their disagreement with the per se rule and begun a two-fold assault on this important safeguard for retail price competition.

First, the Antitrust Division's chief has announced that he will not enforce the legal prohibition against resale price maintenance except when, according to his own economic views, it would be desirable to do so. Second, the Antitrust Division has announced that it plans systematic amicus participation through its "private Action Program" in selected private antitrust lawsuits for the purpose of overturning the current per se illegality of resale price maintenance. This effort runs directly counter to the intent evident in Congress' repeal of "fair trade" laws, and the strong approval there of the per se doctrine. If allowed to proceed, the Private Action Program will permit the Antitrust Division to devote its resources to overturning, not upholding, the will of Congress.

AGMC strongly believes that any departure from present law as radical as allowing vertical price-fixing must come only after action by Congress, with all parties given an opportunity to be heard and a full consideration of the impact that such a fundamental change would have on consumers, the economy, and the nation's system of distribution.

Attached to AGMC's testimony is one illustration of the Antitrust Division's attack on the clearly-settled law prohibiting vertical price-fixing. A front-page Washington Post article published on August 13, 1982, noted the concerns of retailers and others over the Antitrust Division's refusal to act against resale price maintenance activities. According to this article:

"Although this price setting violates federal law, according to Assistant Attorney General William F. Baxter, it has his blessing in most cases.

Baxter, chief of the Justice Department's Antitrust Division, said in an interview that he agrees with critics who charge that these pricing agreements are illegal and may result in higher costs to consumers. But since he has other reasons for believing that the laws against this form of price setting don't make good economic sense, Baxter said he will only enforce them in special cases."

The article goes on to quote Mr. Baxter:

"The disagreement is not about the present state of the law so much as whether that law really makes sense," Baxter said. "The Supreme Court has said on a variety of occasions that vertical price-fixing is per se illegal . . . . It is the position of the Antitrust Division that (this practice) should not be illegal per se in view of certain competitive principles."

In addition to refusing to enforce the well-established law except where it is in line with his personal economic views, Mr. Baxter is also heading up another line of attack on the rule making resale price maintenance per se illegal.

Assistant Attorney General Baxter has identified this planned program of systematic amicus participation in private antitrust lawsuits, at both the trial and appellate levels, as a major policy initiative. As numerous statements from the Antitrust Division have made clear, a key objective of the Private Action Program will be an attack on the per se illegality of resale price maintenance, and an attempt to substitute in its place an undefined balancing test which would in all likelihood require injured retailers and distributors not only to prove the existence of a resale price maintenance scheme, but to also shoulder the tremendous burden of undertaking a broadscale economic analysis to identify the precise competitive harm in the affected industry. Such a drastic policy change would clearly limit, if not destroy, the ability of small businesses to challenge illegal restraints on their competitive pricing freedom.

AGMC believes that attempts to bring the nation's antitrust enforcers into private lawsuits to attack law well-settled by Congress and the Supreme Court misuses the Antitrust Division's valuable resources and exceeds its proper authority.

Rather than a "backdoor" effort to encourage the type of curbs on price competition which Congress struck down by passing the Consumer Goods Pricing Act, the proper course would be a request by the Antitrust Division to Congress for legislative change.

SMALL BUSINESS IS HARMED, NOT HELPED, BY RESALE PRICE FIXING

The evidence before Congress when it outlawed "fair trade" laws showed that resale price-fixing does not help, and may actually harm small enterprises. One persuasive study compared the experience of retailers in "fair trade" and non-"fair trade" areas over a 25-year period (1933–1958). In that study by Dr. Stewart M. Lee, it was found that:

"* * * retailers did not fare better or worse in states without fair-trade than in those that had fair-trade legislation. * * * it would seem that, if anything, the non-fair trade states showed a slight advantage over the others * * *"

Dr. Lee's study, published in the Journal of Retailing (Spring 1965), also found that:

"The best data available do not support the contention that the enactment of fair-trade laws lessens the number of retail failures or bankruptcies or increases the number of retail stores. Whatever effect they have apparently has been slight and in an opposite direction to the one claimed by proponents of fair-trade."

Another study in 1962, undertaken by the Department of Justice, studied retail failures and bankruptcy rates in states without "fair trade" laws, and found them to be significantly lower than in states with "fair trade" laws. In states with the most extreme "fair trade" laws, i.e. those which restricted price competition even by retailers who had not signed a pricing agreement with manufacturers, the failure rate averaged 71 out of every 10,000 firms. In "fair trade" states without non-signer provisions, the rate was 51 firm failures per 10,000 firms. For states without curbs on resale prices, the failure rate was only 29 per 10,000 firms.

The Library of Congress later updated those estimates based on 1972 Dun and Bradstreet data, and found that states without "fair trade" laws that year averaged 23.3 failures per 10,000 firms, while states with "fair trade" laws lacking a non-signer provision averaged 32.2 failures per 10,000 firms. In "fair trade" states with laws including non-signers, the rate was 35.9 failures per 10,000 firms. According to the Library of Congress analysis:

"* * * in other words, fair trade states with fully effective (fair trade) laws have a fifty-five percent higher rate of firm failures than free trade states."

It is also apparent that resale price maintenance arrangements authorized under "fair trade" laws did not promote the growth of small retail businesses or of retail firms carrying "fair traded" items. According to Department of Commerce data analyzed in 1975 by the Library of Congress, between 1956 and 1972, the rate of growth of small retail stores in free trade states (including states which repealed "fair trade" laws during this period) was 32 percent higher than in "fair trade" states.

Resale price maintenance, by foreclosing the ability of small retailers to engage in price competition, in fact acts as an additional obstacle to entry by new firms and a competitive disadvantage to established ones.

RESALE PRICE FIXING RAISES CONSUMER PRICES

There is another point that should be made about the impact of resale price maintenance on small business. Restricting price competition naturally leads to higher prices to consumers—and small businesses are of course consumers just like you or me.

Some idea of just how serious a threat this is can be had by looking at the wide variety of government studies that estimated the costs to the nation's consumers from price maintenance under the old state "fair trade" laws. These studies consistently found that allowing resale price maintenance means billions of dollars each year in higher consumer prices. In 1956, for instance, the Antitrust Division surveyed consumer prices on numerous products and found that, in states with resale price maintenance agreement sanctioned under "fair trade" laws, consumer prices for "fair traded" goods ranged from 19 percent to 27 percent higher than in states without "fair trade" laws.

Another Antitrust Division survey in 1970 examined the prices of 78 "fair traded" items during the week of June 26, 1970 in 57 discount and department stores in 10 cities in four states without "fair trade" laws. It found prices ranging anywhere from 0.2 percent to 27.4 percent below the price enforced by manufacturers in "fair trade" states.

In 1975 hearings before the State Attorney General of California, economist Lawrence Shepard of the University of California estimated that direct and secondary costs of "fair trade" laws meant $6.5 billion in added costs to consumers each year.

The Library of Congress Economics Division also developed a range of estimates for the direct costs alone created by "fair trade" laws. Using various projections of the percentage of retail sales at "fair trade" prices and the percentage by which that price would exceed normal competitive levels, the Library of Congress estimated that, in 1973, the direct costs to consumers of lessened retail price competition due to "fair trade" ranged between $874 million (lowest projection) and $8.851 billion (highest projection).

The study's mid-range projections, assuming 4 percent of retail sales affected by "fair trade" restrictions, ranged from $1.748 billion (if "fair trade" restrictions raised retail prices by 10 percent), $3.322 billion (with a 19 percent price increase, the average for all items surveyed in an Antitrust Division study) and $4.721 billion (with a 27 percent price increase, the level reported on items not sold at "fair trade" prices).

Other evidence in the legislative history leading up to congressional repeal of "fair trade" laws demonstrates the price-boosting effect that resale price maintenance produces. A 1974 survey by the Marketing Science Institute examining the impact of repeal of "fair trade" laws in Rhode Island found price decreases in four of nine product line surveyed. The reductions averaged between 20 percent and 40 percent; all but one of the nine manufacturers reported no sales decline after repeal of the state "fair trade" law. British and Canadian reports likewise found beneficial effects from repeal of "fair trade" laws there.

The 1975 "fair trade" hearings compared retail prices for identical merchandise sold by catalog showrooms in "fair trade" and non-"fair trade" jurisdictions. On some items cited, these prices varied by as much as 64 percent. A number of retail witnesses gave examples of the concrete savings, generally ranging from 20 percent to 40 percent, available to all consumers following the repeal of "fair trade" laws. A re-institution of resale price maintenance will erase these savings and substantially increase retail costs to consumers.

There is ample evidence that resale price maintenance schemes drive up the cost of goods to consumers, but higher consumer prices are not the only drawback of resale price maintenance. The practice also narrows consumer choices. Our economic system is based on the belief that the free choices of consumers in a competitive marketplace will determine the most efficient and accurate allocation of goods and services. Retail price-fixing robs consumers of their freedom to comparison shop for the combination of price, convenience and service that best matches their needs.

While some manufacturers will attempt to justify a higher fixed price as needed to pay for a variety of product-related services and promotions, this really misses the central point. It should be consumers themselves—not the manufacturers and not the government—who decide what's important to them. Fixing retail prices in essence amounts to a hidden tax on all consumers to pay the costs of manufacturer-desired services and promotion, whether or not consumers desire or require them. This is totally out of keeping with a genuine commitment to free marketplace competition.

If current safeguards against resale price maintenance are dropped, goods whose prices at retail remain under the manufacturers' control will become less available, since retail outlets whose marketing strategy centers on price competition are less likely to carry those price-controlled goods. So a ban on price competition in the marketplace will not only foreclose a consumer's ability to shop for a product on the basis of price but will also lead consumers to experience greater inconvenience in finding the product they desire even at the manufacturer-set price.

RESALE PRICE FIXING WOULD HARM THE NATION'S ECONOMIC RECOVERY

Retail price competition plays a significant role in fighting inflation. In the intensely competitive retail marketplace, market forces acting freely promote efficiency in the nation's distribution system and offer consumers a full array of goods at competitive levels of price and service. I will note in passing that even though the retailing industry is generally subject to the same types of increases in operating costs as most other businesses (such as labor, taxes, interest, energy, rents, insurance and materials), vigorous price competition and the knowledge that their customers are free to seek out the best values have led retailers to hold down merchandise prices. It is no coincidence that over the past 15 years price increases in the highly competitive general merchandise retail industry have been only about half as much as increases in the overall cost-of-living, as measured by the Consumer Price Index.

Since retail price-fixing is designed to eliminate competition among retailers, it will naturally result in a higher cost of living. At a time when controlling inflation and interest rates are identified as top economic priorities, reduced price competition would work against those key elements in the national recovery program.

Given these serious economic implications, the Department of Justice should carefully measure and thoroughly analyze the impacts that renewed resale price maintenance would have on consumers, distributors and inflation-fighting efforts. Such a review should not be limited to theoretical considerations, but also ought to include a comprehensive analysis of all major economic issues involved, including such direct impacts as sharply higher consumer price levels, lower sales volumes, increased general inflation rates and consequent impacts on small business, the Federal budget and the national economy.

The inflationary effect of resale price-fixing, incidentally, has been acknowledged by the Federal antitrust officials who are seeking to weaken the current safeguards for retail price competition. A recent Washington Post article outling the Antitrust Division's controversial views on resale price maintenance noted that:

"Baxter concedes that prices may rise in the short run if manufacturers are allowed to specify minimum retail prices."

While AGMC has expressed its concern directly to the Antitrust Division over the heavy price that the nation's consumers, small businesses and retail system will have to pay if Mr. Baxter succeeds in bringing back resale price maintenance, to date, we have not heard from them even a ballpark estimate of the costs of making this major policy change.

Advocates of resale price maintenance overlook one basic fact: resale price maintenance does not guarantee that manufacturer-desired promotion or services will be provided in all cases; it just acts to fix the retail price.

Moreover, manufacturers have a wide variety of devices, such as promotional allowances, service contracts and the like, for ensuring that retailers selling their products take part in desired promotional or service activities. Unlike price-fixing, these incentives are targeted to achieve a specific objective and are not inherently anticompetitive.

CONCLUSION

Our industry regards as vital the continued ability to determine the retail price levels for the merchandise it has bought and paid for.

Price is a central concern for any business enterprise, but in no other quite so clearly as in the retail industry. Every analysis points to retailing as the most highly competitive segment of the economy. A merchant's ability to determine what merchandise to offer and what prices to ask are absolutely essential to healthy retail competition. Although retail firms compete with each other in many ways: merchandise selection, location, convenience, hours of operation, availability of credit, store facilities and a wide range of store policies and services, shoppers and merchants both agree that the most important aspect of retail competition is, overwhelmingly, price. By removing the ability of competitors to engage in price competition, resale price maintenance strikes at the heart of the retail industry.

Moreover, the merchant is the party best positioned in the marketplace to respond to, and to anticipate, consumer desires. The merchant, not the manufacturer, is the most informed and efficient decisionmaker as to the appropriate retail price. By removing a merchant's ability to adapt merchandise prices to marketing strategy, overall demand and consumer preferences, resale price maintenance severely discourages the development of more efficient companies and retailing methods. Like other mechanisms designed to hinder free marketplace competition—such as government-imposed price controls—resale price maintenance will produce unwanted effects such as distortions in the economy and lower productivity.

As experience with "fair trade" laws proved, resale price maintenance harms small business, drives up the price of consumer goods, narrows consumer choices and harms the efficiency of the nation's system of distribution. Any policy change favoring fixed resale prices will fuel inflation and harm economic recovery efforts.

The freedom to determine retail prices for merchandise is essential to the nation's retail industry, which is best placed to judge consumer demand and preferences. Resale price maintenance does not work to ensure provision of the services which manufacturers may desire; better alternatives are available. Resale price-fixing merely fattens product margins and prevents wholesalers from obtaining, and retailers from offering, lower prices for consumers.

The long-established per se ban on resale price maintenance is a crucial safeguard for consumers, distributors and the competitive free marketplace. Any retreat from this fundamental policy of Federal antitrust law would have severe economic consequences. Antitrust officials should not seek to overturn the per se rule, but rather should enforce it in line with Congressional intent and clear judicial precedent.

The Assistant Attorney General has the sworn duty to uphold and enforce settled antitrust law, regardless of his personal views. If he disagrees with that law, his proper course is to come to Congress with a legislative proposal, not to refuse to enforce that law or to participate in private lawsuits in order to overturn law affirmed by both Congress and the Supreme Court.

Thank you once again for this opportunity for AGMC to share with the Subcommittee our profound concerns over the Antitrust Division's refusal to enforce, and announced intention to undermine, the well-settled law prohibiting resale price-fixing. We hope that the Subcommittee will continue to work to preserve this important competitive safeguard.

[From the Washington Post, Aug. 13, 1982]

ANTITRUST CHIEF SEES NO EVIL—JUSTICE ALLOWS ILLEGAL PRICING

(By David A. Vise)

A growing number of manufacturers are dictating the retail prices that stores can charge for their products. Although this price setting violates federal law, according to Assistant Attorney General William F. Baxter, it has his blessing in most cases.

Baxter, chief of the Justice Department's Antitrust Division, said in an interview that he agrees with critics who charge that these pricing agreements are illegal and may result in higher costs to consumers. But since he has other reasons for believing that the laws against this form of price setting don't make good economic sense, Baxter said he will only enforce them in special cases.

Baxter's policy has upset discount retailers, who fear they no longer will be able to obtain brand-name merchandise to sell at reduced prices. The administration's policy, they claim, means higher prices for consumers.

Baxter's views also have infuriated several key members of Congress who believe a public official does not have the right to ignore laws simply because he doesn't agree with them.

"This is a most unusual and extreme situation," said Sen. Arlen Specter (R-Pa.). "The law in this area is not being enforced and people complaining to me have every right to be furious."

"Throughout the long history of antitrust in the United States, there has never before been such an attempt to ignore the clear intent of Congress and the law as interpreted by our Supreme Court," said Sen. Howard M. Metzenbaum (D-Ohio). "It seems that Mr. Baxter and his associates believe that it is their right to disregard entire areas of antitrust law because the law is different from their personal economic theories."

In 1975, Congress made it illegal for manufacturers to dictate the prices that stores charge customers. The legislation was passed with almost no opposition after many members of Congress and President Ford argued that "legalized price-fixing" was costing consumers $2 billion a year.

The Supreme Court has ruled on several occasions that this type of price setting is illegal.

While Baxter agrees that the price setting he is allowing is illegal, he believes that in certain situations, allowing manufacturers to specify retail prices has effects that encourage competition.

"The disagreement is not about the present state of the law so much as whether that law really makes sense," Baxter said. "The Supreme Court has said on a variety of occasions that vertical price fixing is *per se* illegal. . . . It is the position of the Antitrust Division that [this practice] should not be illegal per se in view of certain competitive principles."

Baxter said he believes manufacturers of technologically complex products like cameras, stereos, calculators and personal computers should be allowed to specify minimum retail prices. Without this protection, Baxter said, retailers will not provide the trained staff needed to sell these goods.

At the extreme, Baxter said, this may stifle innovation since manufacturers may decide not to produce technologically complex goods if they will not be supported by retail sales services.

"If it is possible for a consumer to go into a store and take advantage of a highly trained sales staff, and then say, 'Thanks, now that I understand the product I'm going to walk down the street and buy it at a discount house', then no retailer can afford to provide point-of-sale services and the product may be driven off the market," Baxter said.

"I would permit [manufacturers to dictate prices charged by stores] for technologically complex products that had been on the market for a short time, and I see no reason on earth why it shouldn't be permitted any time one is sure that it is not being used as a device to facilitate horizontal collusion," Baxter added.

Horizontal collusion, a violation of the Sherman Antitrust Act, occurs when restrictive agreements are made among competitors. For example, there is horizontal collusion when retail competitors agree to sell an item at a specified price.

Baxter concedes that prices may rise in the short run if manufacturers are allowed to specify minimum retail prices. However, he believes that there is a greater long-run danger that may result if "a whole category of complex products is not developed and brought to the market because it is not possible for them to be distributed and merchandised in a way suitable for those particular products."

Service Merchandise, the nation's second-largest catalogue showroom retailer, has allied itself with other companies, trade associations and consumer groups opposed to Baxter's views and to new Federal Trade Commission rulings that enable some manufacturers to restrict distribution.

Discount retailers such as Best Products Co., K Mart Corp., Wal-Mart Stores and Service Merchandise, long accustomed to the refusal of manufacturers to sell to them directly, would often purchase their goods from dealers or "middlemen." But a shift in antitrust policy at the FTC and the Justice Department now permits some manufacturers to prohibit middlemen from selling their products to discount chains.

Service Merchandise has a list of 70 makers of brand-name merchandise that refuse to sell to it directly. Since Service Merchandise will no longer be able to buy many of these goods from middlemen, consumers will be paying higher prices, company officials said.

Service Merchandise officials believe Reagan administration policies take away the right of consumers to pay lower prices and do without in-the-store services provided by more expensive retailers.

"We think consumers may want to skip the cooking lessons in the store and buy the oven for less from us," said Service Merchandise attorney H.E. Lambert. "In this case, we are faced with an administrative agency [the Justice Department] ignoring the law. If changes in the law are going to occur, that should take place in Congress where both sides can articulate their views."

Sanford Litvack, who preceded Baxter in his post at the Justice Department, said it is "fundamentally wrong" for the nation's chief antitrust official to not enforce the law because he doesn't like it. He also disagreed with Baxter's economic arguments.

"In the real world, allowing manufacturers to set minimum retail prices offers no advantage to the consumer," Litvack said. "The argument that discounters are 'free riders' who live off other retailers' promotions has been taken much too far.

"Their cure will result in higher prices and it is worse than the problem," Litvack said.

Mr. LUKEN. I have no questions.

Mr. Daub?

Mr. DAUB. No, except, Mr. Chairman, to find out at least a very brief glimpse of your conversation or your result with the Attorney General.

Mr. BORDA. Well, we met with the Attorney General some months ago. And I say we, it was our organization——

Mr. LUKEN. Was it the Attorney General?

Mr. BORDA. I am sorry, the Assistant Attorney General, Mr. Baxter. There were, I think, a dozen people at the meeting on the business side, representatives of AGMC, representatives of the National Mass Retailing Industry, representatives of the National Association of Catalog Showroom Merchandisers, and from major companies represented by those three groups. At that meeting, we were convinced that we had made no impact on Mr. Baxter and that he was determined to overturn the per se illegality on resale prices.

We discussed with him our concerns over the statements that not only he was making, but members of his staff were making that were, in our view, being very disruptive of the marketplace.

We discussed some of the problems that some of the companies were encountering. I don't want to go into names of companies, either manufacturers or retailers, but we discussed the fact that certain companies were confronted in buying situations by suppliers coming in now with their lawyers, telling them, "All right, we have heard what the Justice Department is doing, so now let's sit down and talk some hard price." That has become a new factor for many of our members.

In other instances, some of our members or members of the other associations present, were simply cut off from goods they have been carrying. In respect to the argument raised by Mr. Baxter and the Chicago school theorists, about "free riders" and other language insulting to the industry, calling it parasitic, and so on, we pointed out, No. 1, that in many cases, our members who will be affected by this are providing services.

Mr. LUKEN. Could I interrupt for a moment? We do have a time problem, and I think what Mr. Daub was getting at was Mr. Baxter's reaction.

Mr. BORDA. All right.

Mr. LUKEN. The arguments, which you have very effectively presented and the others have—similarly situated—presented. I think we are particularly interested in what his reaction was when confronted with those.

You made the same arguments that you are making now to him, right?

Mr. BORDA. Yes.

Mr. LUKEN. Isn't that particularly what we are interested in? What was his reaction to that?

Mr. BORDA. When we presented our arguments on free rider, he said, "Well, that is not important anyway," and moved on to something else.

It was his feeling that there should not be a per se rule of illegality; that there should be a rule of reason, but it was pretty clear from what he was saying that he would only find resale price maintenance illegal if there was a horizontal impact or in a cartel situation. So that, in effect, there would longer be any prohibition against resale price maintenance. He said he didn't mean to disrupt the marketplace; it was his view that it shouldn't be per se illegal. He thought that the Supreme Court had already indicated that they would like to move toward a rule of reason.

I think he cited a *GTE-Sylvania* case, we pointed out to him that in the *GTE-Sylvania* case, the Supreme Court had very clearly noted in a footnote that Congress had spoken on this issue, and they clearly were excluding vertical price fixing from that decision.

He didn't agree with that. He felt that the courts are now going to listen to economic data, and that he was going to apparently attempt to bring that data to their attention, and turn the law around.

Mr. DAUB. Thank you.

Mr. LUKEN. In the August 13 Washington Post article, with which I am sure you are familiar, quotes Mr. Baxter, but not necessarily fully, as saying that, "The Supreme Court has said on a variety of occasions that vertical price-fixing is per se illegal." Then it quotes him as saying, "It is the position of the Antitrust Division that this practice should not be illegal, per se, in view of certain competitive principles."

It would seem from this that Mr. Baxter was saying that he was going to pursue his view that price maintenance should not be illegal, even though the Supreme Court has said that it is illegal.

But now, you seem to give some variation of that from what Mr. Baxter said that he has told you that in view of certain cases that were moving in certain directions, that he felt that he would be able to argue that price maintenance was not illegal to the Court without going directly contrary to their previous decisions. Is that right?

Mr. **Borda**. No. He acknowledged that, clearly, the decisions right now make it clear that resale price maintenance is illegal. He does not agree with that, and therefore will use the force of the Justice Department, and when we brought that up to him, he replied that he didn't think that was such a great force, at any rate, but that he would attempt to turn that law around.

Now, we have a letter from him following that meeting, in which he reiterated——

Mr. **Luken**. He would attempt to turn it around.

Mr. **Borda**. He will attempt to turn it around, and they will use the amicus participation method, through their private action program. In other words, they will intervene, in private actions, to argue on the other side from what the law is now.

Mr. **Luken**. But not argue from the authority of the Supreme Court.

When one makes a legal argument in court, one usually argues from authority, and the authority of the Supreme Court is the highest authority in the American courts. You are saying that he is going to argue from the authority of William Baxter and contrary to the Supreme Court. Is that what he said to you, in so many words?

Mr. **Borda**. In so many words, yes. It is his view, the Chicago school view, that the law is wrong, and it should be changed.

Mr. **Dalton**. Did he say that in his letter?

You said he sent a letter to you following the meeting.

Mr. **Borda**. Just quickly: "We regard the stated law as unsatisfactory, and are reviewing the possibility of asking the Supreme Court to change it." And then skipping down: "Therefore, if the Court is disinclined to modify its traditional approach in this area, or if the Court reads the 1976 legislation as foreclosing its ability to reconsider the issue, we will then consider the appropriateness of seeking legislative change."

We heartily agree with the last part. If he disagrees with the law—as Assistant Attorney General, he has taken an oath to uphold the law, and we feel that he should uphold the law—then he should come to Congress, certainly on an issue as important as this.

Mr. **Luken**. Thank you very much for your very illuminating testimony.

Mr. **Luken**. Is Mr. Campbell here?

Dr. Campbell? I believe we have your testimony. Do we?

Mr. **Campbell**. I believe you do, Mr. Chairman.

Mr. **Luken**. Yes, we do. All right, it will be received in the record of this committee, and you may proceed to present it in any manner you see fit.

Ms. **LaChance**. May I say something first? The FTC has provided the subcommittee with revisions on some of their tables, and those will be included in the record as well with Mr. Campbell's prepared statement.

Mr. LUKEN. All right; without objection, those are revisions of the ones we have here in the hearing book, is that the idea?

Ms. LACHANCE. Yes.

Mr. LUKEN. All right, the revised versions will be inserted with your prepared statement.

TESTIMONY OF THOMAS CAMPBELL, DIRECTOR, BUREAU OF COMPETITION, FEDERAL TRADE COMMISSION

Mr. CAMPBELL. Mr. Chairman, thank you so much for asking me to be here today, and thanks particularly to the members of your staff who have been so patient, particularly in the area of getting these tables to you.

I regret to say it is a continuing process getting accurate tables, but I think what you have now is accurate, and we will continue to work with your staff to make sure that is so.

In view of the fact I have submitted my testimony, I will try to be brief, and just summarize the main points. I am here today to discuss the enforcement approach of the Federal Trade Commission on vertical cases generally, and one aspect in particular, the Robinson-Patman Act.

I am the Director of the Bureau of Competition with the Federal Trade Commission, and I have held that position for almost a year. I have consulted the views of all the people in the Bureau of Competition and the Commission who are knowledgeable in these areas, but the views I express today are my own, and not necessarily those of the Federal Trade Commission or any individual Commissioner.

I would like to begin by emphasizing that small business and competition are closely related. I have always felt, and I stated in my submitted testimony again, that it is the small business in the U.S. economy that has been most competitive; it is the first to propose innovations; and it is the first to propose lower prices, longer hours, better terms, and innovative end project. In sum, they are a substantial factor in keeping our free market competitive.

Hence the preservation of vigorous competition is vitally enhanced by small businesses, and that judgment informs every decision I make at the Federal Trade Commission.

Small business can and should take full advantage of our antitrust laws. So the question to dwell on today is: What should I do as Director of an enforcement bureau on behalf of small business and on behalf of competition?

I believe I have three purposes: First is to enforce with vigor the antitrust laws that prevent the accumulation of market power by large firms, because as has been accurately stated by previous witnesses today, it is when large firms accumulate such market power that they can do the most damage to the small, competing firm.

Second, to uphold the right of individual plaintiffs in any context in which they are exercising their rights under the law to enforce the antitrust laws, and I will return to that in just a second. Third, to maintain an undiminished presence in those areas of antitrust of most concern to small business.

On point 1, I believe our record of antitrust enforcement has been very good. In terms of merger enforcement, our Commission has been there whenever needed to stop an illegal merger, and particularly so when no one else could stop an illegal merger.

I cite only as the most recent example the activity of the Commission in seeking and obtaining a temporary restraining order in the Gulf-Cities Service merger. I note as well the activity of the Commission in the Mobil-Marathon merger; LTV-Grumman merger; and B. F. Goodrich-Diamond Shamrock mergers.

My first point, then, is that this most important contribution made by the FTC in the area of preserving competition and preventing accumulation of market power by large firms must also benefit small competition.

Two, the FTC takes quite seriously its advocacy role on behalf of small business. I was pleased to hear the Small Business Legislative Council representative this morning compliment Chairman Miller on his Outreach program to small business.

I and members of my immediate office have met countless times with members of small business organizations. We have joint research projects with the Small Business Administration, and I have never criticized any individual suit brought by a small businessman under any statute, including the Robinson-Patman Act.

Nor have I or any member of the Commission ever stated that the Robinson-Patman Act should be repealed, or that interpretations of the law under Robinson-Patman are erroneous. I will return to that point later.

The final issue on this advocacy role is that the Federal Trade Commission has participated as well in amicus curiae briefs to the Supreme Court. And most recently, in the *Falls City-Vanco* case, which is to be argued this October term in the Supreme Court, I draw the committee's attention to that submission, because in that case, in an area of our expertise, the Robinson-Patman Act, we urged the Court that the act not be interpreted in such a way as it would harm the small business whose activities were in issue in that case.

Point 3, our activity in those areas of most concern in the antitrust field to small business, Robinson-Patman and vertical restraints—I wish to emphasize one word, and that is continuity. We have maintained an undiminished presence in these areas.

Presently, at the Federal Trade Commission, there are over 50 vertical restraint cases open. This year, the numbers ending at midyear, we had opened 31; we had opened 78 the year before, under Acting Chairman Clanton and Chairman Miller.

This averages to 68 vertical cases a year, as compared with an average—and I note this to the committee—of 33 vertical cases initiated per year during the previous 4-year administration. This more than doubling of initiated investigations makes clear the FTC's continued presence in enforcing this aspect of the antitrust laws.

As for complaints issued by the Commission involving vertical restraints, six were issued last year; several more are awaiting action now, whereas, over the entire previous 4-year period, only five complaints were issued.

The Commission has, within this year, accepted two consent decrees prohibiting resale price maintenance.

Focusing next on Robinson-Patman, again I emphasize continuity. We are enforcing the laws. There are presently 18 investigations pending at the Federal Trade Commission, and 6 docketed cases pending either trial or Commission decision involving the Robinson-Patman Act.

By midyear, we had opened 12. The previous year, 31 Robinson-Patman complaints had been opened, which is an annual average of 22. By sake of comparison, again, the previous 4 years' annual average, 15 Robinson-Patman complaints.

This is not the record, Mr. Chairman, of an agency that is interested in shutting down Robinson-Patman or vertical antitrust enforcement. Nor is it a record without room for improvement. It is a record to be built upon. But I do not see how anyone could challenge the conclusion—that the Federal Trade Commission in this administraton has been committed to the continuity of antitrust enforcement in vertical restraints and in Robinson-Patman.

Let me turn briefly, then, away from the numbers and toward the quality of cases. In my prepared testimony, I have attempted to lay before this committee the criteria that I consider important in determining whether a case is a good one and what I would take into account in recommending a case to the Commission.

Two concerns are of most relevance here. One is a positive, and one is a negative concern. The positive concern is that we must commit resources where the law enforcement action is most needed.

The second is that we not use resources to harm consumers. In making these decisions, and in making my recommendations to the Commission, I do not claim to know more than the U.S. Supreme Court.

I do not claim to know more than the U.S. Congress. I merely apply the unavoidable duty of a prosecutor that no matter what statute, a prosecutor select the cases where the public is best served. In outlining the criteria for selecting those cases, I have attempted in my prepared testimony to acquaint the committee with how I try to rank Robinson-Patman and vertical cases in terms of their priority.

That rule can easily be summarized. I never wish to recommend a case to the Commission that will do more harm than good to competition. I don't think small business wants that, either.

Our statute, passed by Congress, requires us not to bring any complaint unless it is in the public interest. In that analysis, I wish to make clear, I do not support a return to fair trade laws. I do not support a rule of per se legality for resale price maintenance. I do not require proof of economic harm beyond doubt, as has been suggested. But in those instances, and they may be few, where resale price maintenance helps competition, I submit that fact cannot be ignored. I do not ignore that in my recommendations to the Commission. Having said this, let me note that to date, I have not closed a single case because it involved resale price maintenance.

Nor have I given any order to any office within the Bureau of Competition or the regional offices of the Federal Trade Commission not to proceed with such cases in the proper fashion leading toward prosecution.

I have explicitly authorized several resale price maintenance investigations since coming to my position as Director of the Bureau of Competition.

The pledge to bring cases that do not harm competition is not a novel concept. I would expect that it is a concept shared by many of my predecessors, many of the Commissioners and many of the members of this committee.

But finally, communication is so very important. I and Chairman Miller have made an effort to be communicative to small business. I am grateful for those remarks indicating that that has borne some fruit this morning.

It grieves me that in one witness' testimony that you have heard this morning, the witness said he had a problem, but hadn't brought it to the FTC. I can assure this committee I will contact that witness and see what their problem is.

But in conclusion, the communication function will stay open as long as I am directing the Bureau of Competition. In that regard, my final comment is to thank the chairman and particularly his staff for opening up an important line of communication, so that I can receive input from this committee, and in turn, provide some information that may be of interest to this committee in what I am convinced will be a continuing beneficial dialog.

I thank you.

[Mr. Cambell's prepared statement follows:]

PREPARED STATEMENT OF THOMAS J. CAMPBELL, DIRECTOR, BUREAU OF COMPETITION, FEDERAL TRADE COMMISSION

Mr. Chairman and members of the Subcommittee, good morning. My name is Thomas J. Campbell. I am Director of the Bureau of Competition at the Federal Trade Commission. I am appearing before you this morning as the employee of the Commission most directly responsible for the subject areas that concern you in these hearings. I should emphasize, however, that I am presenting solely my own views, and my remarks do not necessarily represent the views of the Commission itself or of any individual Commissioner.

The subcommittee has asked that I focus on the enforcement of the antitrust laws governing vertical business relationships. These are the relationships between a manufacturer and its dealers, as opposed to those between a firm and its competitors. For legal purposes these vertical relationships are divided into two types. In some it is charged that a manufacturer is unduly favoring a dealer through particularly low prices. These cases are governed by the Robinson-Patman Act. In other cases it is charged that a manufacturer is unduly restricting dealers, as through the use of assigned territories or exclusive-dealing clauses in their contracts. These situations are governed by the law on vertical trade restraints.

Three issues about the enforcement of these laws deserve attention. This Subcommittee has asked me for my views on the proper evaluation of complaints, on the best criteria for selecting the cases to be litigated, and on the practical effects that these policies will have for small business. I will try to cover each of these points in my remarks. First, I will discuss the Robinson-Patman Act, and the elements that constitute a persuasive complaint and a good case under that statute. I will then similarly review our criteria in the area of vertical restraints. Finally, I will present some tentative conclusions as to the possible effects that these policies might have on the small businesses of this country.

THE ROBINSON-PATMAN ACT

Let me begin with the Robinson-Patman Act, the statute governing price discrimination. The basic thrust of this Act is to prohibit manufacturers from giving a lower price to some of their dealers, solely on the basis of the dealers' bargaining power, and unjustified by the lower costs of servicing those accounts. Price breaks of this sort could, of course, allow the favored dealers to dominate the retail market. The aim of the Robinson-Patman Act is to permit the smaller dealers to compete fairly and on the basis of their own efficiency. The language of the statute is complex, and the terms are not all precisely parallel, but their general effect is to prohibit the granting, or the receipt, of non-cost-justified price advantages "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly * * *."[1]

We believe that the terms of the Robinson-Patman Act should be fully and vigorously enforced. In deciding on which cases to prosecute, we select first those cases where the business conduct is most harmful to competition and consumers. Competitive and consumer harm can assume several forms, but one type of injury strikes us as especially significant. American economic prosperity draws heavily on the powerful tendency of business rivalry to produce a greater sum of goods and services from a given amount of resources. Conduct that weakens the drive of individual firms, and especially small businesses, to give consumers "more for less" deprives society of a vital source of increased economic wealth and deadens a dynamic process of growth that has served the nation well. This type of practice arguably threatens consumer well-being most and therefore commands our closest attention.

With these principles in mind the Commission has maintained a continuous and visible presence in the Robinson-Patman Act field. The Commission has never advocated that the Robinson-Patman Act be repealed. Moreover, although the statute can be fully enforced by private lawsuits, the Commission has always been attentive to bringing cases on its own, to lend its support to the vigor of the statute, and to influence the development of the law. The tables that are appended to my statement indicate the numbers of Robinson-Patman cases brought by the Commission in recent years.

So far I have been addressing the general level of the Commission's activity. I also wish to deal more specifically with the particular kinds of situations in which the Commission is likely to pursue a Robinson-Patman matter. The cases where Commission action is most common can be grouped under three headings. These are: (1) cases where price discrimination has been used as a tool for attempted monopolization or predatory conduct; (2) cases where a dealer or dealers with market power have forced the seller to give it a price break; and (3) cases where a manufacturer has tried to confer market power on a favored dealer in exchange for preferential treatment at a later time. Let me take a few minutes now to elaborate briefly on each of these situations.

The first group of cases involves predation or attempted monopoly. A large, dominant firm may use selective price cuts in a campaign to drive its smaller rivals from the market. If the price cuts result in the goods being sold below cost it constitutes predation, and may be illegal. The standards for actionable predation are quite strict.[2] Where predation is present, however, the tools by which it was carried out will often include Robinson-Patman Act violations. The price cuts will often have been focused on particular groups of customers or geographic markets, resulting in a discrimination between those sales and sales made outside the target area. In addition to challenging the predation directly, therefore, the Commission may also challenge the price discriminations used to carry it out.

In a second group of cases the price discrimination originates with a dealer rather than with the manufacturer. This is the so-called "power buyer" situation. A powerful dealer may demand a special price concession from the factory and threaten to withhold its business, or to reduce its orders, if the concession is not granted. The resulting reduced demand may well lessen the nation's total output of goods and services. This is, moreover, bad competition policy since price breaks have been given on a basis other than efficiency or "the merits." Where this situation exists we would want the Commission to be especially vigilant on behalf of the smaller competitors. At least two of our internal investigations presently involve such allegations, one focusing on a department store's purchase of housewares, and the other on a chain store's purchase of books.

A third group of cases involves attempts by a manufacturer to confer market power on one of his dealers. This practice unfairly burdens the competitors of the favored dealer. The Commission has a complaint outstanding against General Motors which raises some of these issues. The complaint charges that GM has given discriminatory advertising allowances to the largest car rental agencies. If true, it would suggest that the company has increased its chances of making large fleet sales, but that the smaller rental firms have been unfairly disadvantaged as a result.

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[1] 15 U.S.C. §§ 13(a), 13(f).

[2] The Commission will consider, among other factors, the depth and duration of the price cuts, possible explanatory factors such as a distress sale of perishable goods, and the height of any entry barriers into the market.

Having focused on those areas where price discriminations can be most harmful, let me note that this is not intended to be an exhaustive list of instances where the Commission will take action. Nor does this listing mean, however, that every price difference is, or should be viewed as, illegal. Price differences that are honestly competitive, that reflect genuine efficiencies, are perfectly proper. The Robinson-Patman Act recognizes this. There are therefore a number of specific, established areas in which we would not expect to bring a Robinson-Patman case: (1) where the price difference merely reflects the actual differences in the costs of servicing dealers; (2) where a price difference is offered to meet a good-faith price of a competitor;[3] (3) where the discrimination is not large and is unlikely to last long before being corrected by the market; (4) where alternative sources of supply at the discounted price are readily available; and (5) where our action, by demanding uniform charges, would tend to stabilize prices among members of an oligopoly.

Most of these situations really never involved Robinson-Patman violations in the first place. They are cases that come within one of the express exemptions in the statute, or that do not cause the requisite harm to competition.

VERTICAL RESTRAINTS

Let me turn now to the second major topic—vertical restraints. These involve the restrictions that a manufacturer imposes on the way that its dealers can do business. The subject is conventionally divided into two major subcategories: price restraints and non-price restraints. A manufacturer may seek to control the price that the dealer charges or he may seek to control the collateral terms such as a dealer's sales area.

I believe that vertical restraints can have either procompetitive or anticompetitive effects, depending on their exact terms and the context in which they are used. I therefore believe that each case should be evaluated on its own merits; in none should, we automatically extend either approval or condemnation. This is already the law with respect to non-price restraints, which are judged by the rule-of-reason standard. It was not always so, however. In the *Schwinn* case in 1967 the Supreme Court held that such a restraint was per se illegal. But ten years later, in *GTE-Sylvania*, the Supreme Court reversed itself and established the rule-of-reason standard for non-price vertical restraints.[4] This is not yet the law on price restraints, which are still judged on a per se basis, but the exercise of prosecutorial discretion in opening the case in the first place will probably bring about much the same results in practice. Indeed, in his concurring opinion in the *GTE-Sylvania* case, Justice White noted that there was no legal, economic, or other logical reason for treating price and non-price restraints differently.

Our vertical restraints activity has been relatively constant over the years. This is shown in the statistical tables that accompany this statement.

I will now focus specifically on non-price restraints, and return later to price restraints. Non-price restraints involve all the ways in which manufacturers can dictate the terms of a dealer's operation. They might designate primary or exclusive territories. They might restrict the transshipping of products. They might tie together the sale of several different products. They might require an agreement that the dealer not handle any competing product lines. These non-price restraints are judged by the rule-of-reason, taking all pertinent factors into account. That is reasonable since the restraints can have both bad and good effects.

A few examples of the bad effects of vertical restraints might be instructive. Such restraints can damage competition when the manufacturer has a very large share of the market, or otherwise possesses market power. In that case a dealer which is unhappy with the manufacturer's terms will not have an alternative supplier to which he can turn. Coercion then becomes a real possibility. This does not mean that every manufacturer with a large market share should be condemned, of course. If entry barriers are low a firm may still be unable to exercise market power. But the threat is there, and this is certainly a case that we would want to look at more closely.

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[3] We expect the Supreme Court to provide further guidance in this area in *Falls City Industries* v. *Vanco Beverage*, Dkt. No. 81-1271, a case in which the Commission has filed an amicus brief supporting the position of a small brewery enterprise competing against larger concerns.

[4] See *Continental TV* v. *GTE-Sylvania*, 433 U.S. 36 (1977), overruling *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

It is also possible, on the other hand, for vertical restraints to have beneficial, procompetitive effects. This occurs when the restraints are used to unify, organize, and discipline the sales network for a product, so that it can compete more effectively against other products of the same general description. Vertical restraints may induce desirable dealer services. The loss in intra-brand competition may then be outweighed by the gain in inter-brand competition. We have seen this in a number of forms. Assigned sales territories have encouraged dealers to focus their efforts and reach all possible customers. Exclusive-dealing contracts have enabled manufacturers to provide costly support services to their dealers, as we learned in the recent *Beltone* case. Tying arrangements have ensured that complex new technologies are correctly packaged and marketed. Each of these restraints may be to the benefit of the smaller dealers, and should not be needlessly discouraged. In short, non-price vertical restraints can also be procompetitive, and so each case is, and should be, judged on its own merits.

The situation with respect to price restraints is somewhat more complex. These restraints almost invariably take the form of specified minimum retail prices. They are illegal per se, just like horizontal price-fixing under the Sherman Act. It is not clear that they should be, however. Sometimes even resale price maintenance can be procompetitive. But let us first recognize that resale price maintenance may indeed have bad effects. These effects will be felt most keenly where the manufacturer has a large market share, so that consumers unwilling to pay the stipulated prices will not have adequate alternatives. In addition, resale price maintenance may be used by the members of a price-fixing agreement as a convenient way to stabilize their prices. The principal issue in either case is market power, whether possessed by a single firm or by a cartel; and the harm in either case is suffered by the consumer who does not have alternatives.

In other circumstances RPM may very well be procompetitive. It may provide the consumer with increased options by ensuring that there are strong, well-financed local dealers available to serve him. A number of examples come to mind. By maintaining profit margins, resale price maintenance may help a new entrant persuade established dealers to carry its line. It may serve as an efficient incentive for dealers to provide desirable but expensive point-of-sale services that would otherwise not be offered for fear that a customer would receive the point of sale service at one establishment and buy the goods at another. When selecting our cases we should therefore consider both the good and bad effects of a particular instance of resale price maintenance, and should not recommend a complaint to the Commission unless the practice, on balance, is harmful to the consumer. The law as interpreted by the Supreme Court establishes the outermost boundaries of conduct that can be prosecuted. Choosing cases for prosecution within those boundaries remains a function of prosecutorial discretion. What I have said today describes the simple rule that we have been following in exercising that discretion; namely, we should bring cases that promise to benefit consumers, and certainly not those that are likely to bring them harm.

EFFECTS ON SMALL BUSINESS

What are the practical effects of these criteria upon the small businesses of this country? One part of the answer seems fairly clear. Our general direction has been clearly supportive of small business. Our Robinson-Patman cases have forbidden price discrimination to powerful buyers and have enabled smaller dealers to continue to compete on their own merits. Where we have urged a more lenient view of that statute, as in the *Falls City-Vanco* case, it has been to benefit a small business which was sued under the Robinson-Patman Act by larger businesses. Similarly, our prosecution of resale price maintenance cases has benefited small businesses by allowing dealers to compete among themselves. And when we have recognized that resale price maintenance, like other vertical restraints, can sometimes have beneficial and procompetitive effects by, among other things, ensuring a strong dealer network, it is again likely that small businesses, either as dealers or as new entrants into an industry, will be the beneficiaries.

I believe the course we have been following is the right course. To prosecute every technical law violation, without analyzing the harm to competition, would hurt small businesses and consumers as well. In the Robinson-Patman area, for example, we would run the risk of cutting in on vigorous price competition and on efficient, cost-justified discounts. That would be bad law, a wasteful approach, and in fact we do not read or understand the small business community to be urging such a course. It should always be remembered that likely alternative to imposing vertical restraints is for manufacturers to integrate downstream or forward, to open their own dealerships in order to maintain control over the way the distribution process works. That could be bad policy, since it could well wipe out the independent dealers and replace them with still larger corporations than we have today. Surely, small businesses would not be better off in that event.

The Federal Trade Commission is a strong advocate of competition and, in consequence, a friend of small business. We are always willing to pursue Robinson-Patman and other cases that will in fact benefit both small business and the consuming public. Let me repeat a statement I made shortly after taking on the duties of this position: I came to this job with one bias. That bias is the small businesses have contributed in a way disproportionate to their size to free competition in this country. It is the small business that, more ofter than not, is first to innovate, first to seize upon a new marketing concept, first to respond to consumers' needs. The small businesses of this country are responsible for more employment growth than any other sector. The continued fostering of small business is vital to our national competitive economy; and all of my judgments in antitrust are informed by that belief.

Thank you very much. I shall be pleased now to address your questions.

STATISTICAL APPENDICES

The questions in this Appendix are those set out in the letter from Chairman Luken to Chairman Miller, dated August 20, 1982.

A general qualification should be mentioned at this point. The figures given here should be treated as approximations. A number of factors, such as changes in the legal theory as a case progresses, the severance or consolidation of individual cases, changes in the forms of remedy that the Commission seeks, and the fact that records may be kept under different standards at different times, all result in figures subject to somewhat differing interpretations.

Question 1. Please provide a history of the Federal Trade Commission's funding for each fiscal year from fiscal year 1975 to fiscal year 1983. This should include the amount requested from Congress, the amount appropriated, actual total expenditures, the amount expended by the Bureau of Competition, and the amount of total expenditures used in efforts to maintain competition.

FTC FUNDING HISTORY, FISCAL YEARS 1975–83

[In thousands of dollars]

Fiscal year	Budget		Obligations		
	Request to Congress [1]	Appropriated by Congress [1]	FTC [2]	Maintaining competition [2]	Bureau of Competition [3]
1975	39,479	38,983	38,962	[4] 12,762	7,571
1976	47,443	47,199	47,056	[4] 17,061	9,097
1977	55,053	54,680	54,640	26,457	13,302
1978	62,611	62,100	61,448	27,724	12,562
1979	68,485	65,300	64,998	28,541	12,926
1980	72,236	66,059	66,059	29,595	12,924
1981	70,774	70,774	69,927	31,589	13,583
1982	61,123	68,774	[5] 68,774	[5] 31,018	[5] 13,494
1983	60,838	([6])			

[1] This data is taken from congressional budget submissions (Budget Appendix) and reflects the last request before Congress acted. Revised requests were sent to Congress in fiscal years 1980, 1981, and 1982.

[2] Congressional submission (Budget Appendix) adjusted for change in selected resources where appropriate.

[3] Commission financial reports.

[4] Agency budget reflected 5 missions in fiscal years 1975–76; thus data does not reflect allocation for administrative support included in fiscal 1977–82.

[5] Estimated.

[6] Pending.

Question 2. Please provide a history of the total number of Commission employees, the number of employees engaged in antitrust activities, and the number of employees in the Bureau of Competition for each fiscal year from fiscal year 1960 to fiscal year 1982.

FTC APPROPRIATED [1] POSITION HISTORY, FISCAL YEARS 1960–82

Fiscal year	Total FTC	Maintaining competition mission	Bureau of Competition
1960	756	381	([2])
1961	823	427	([2])
1962	1,072	577	214
1963	1,178	623	202
1964	1,178	606	202
1965	1,175	602	205
1966	1,175	599	203
1967	1,175	573	202
1968	1,244	575	208
1969	1,306	563	208
1970	1,469	565	205
1971	1,385	518	200
1972	1,462	546	202
1973	1,530	[3] 336	230
1974	1,580	372	264
1975	1,610	503	277
1976	1,678	594	334
1977	1,712	[4] 758	349
1978	1,694	741	350
1979	1,784	790	373
1980	1,784	802	371
1981	1,698	800	370
1982	1,455	614	318

[1] Positions appropriated by Congress, full time permanent and temporary.
[2] Budget did not identify Bureau positions.
[3] Economic activities mission was created which transferred some positions from the maintaining competition mission.
[4] Budget adjusted to reflect three missions instead of five; additional support positions added to competition mission.

Question 3. Please provide the number of complaints and requests for Commission action concerning violations of the Robinson-Patman Act, as well as the number concerning vertical trade restraints, received by the Commission in each fiscal year from fiscal year 1960 to fiscal year 1982.

The Commission does not maintain correspondence records that are sufficient to give a detailed count of all letters received or a breakdown of correspondence between "complaints" or requests for Commission action and general inquiries. Correspondence enters the Commission's Bureau of Competition through several gateways, so that there is no single office or point through which all correspondence might be monitored.

We can approximate the volume of correspondence only within the past several years, and only by reference to a number of separate logs or files including separate logs for congressional and non-congressional correspondence, a sample of outgoing correspondence, and an informal survey of attorneys in the Office of Evaluation.

COMPLAINTS AND INQUIRIES RECEIVED, BY SUBJECT MATTER

Year	Written correspondence		
	Total [1]	R–P	Other vertical
1978	1,150	160	550
1979	1,500	200	700
1980	1,075	135	500
1981	950	105	450
1982 [2]	2,120	75	400

[1] This includes correspondence referred to the Bureau on all subjects, including mergers, monopolization, and other matters as well as R–P and vertical restraints.
[2] Through August 27. The number of letters is unusually high because of correspondence concerning well-publicized mergers this year (e.g., Mobil/Marathon).

Question 4. Please provide the number of formal investigations undertaken by the Commission each fiscal year from fiscal year 1960 to fiscal year 1982. In addition,

provide the number and manner of disposition of formal investigations during those years, including the number of investigations closed without action, and the number resulting in a complaint or consent order.

Our response to this question is set forth in the two tables below, one dealing with Robinson-Patman Act investigations and the other with investigations of vertical restraints.

ROBINSON-PATMAN ACT—INVESTIGATIONS

Fiscal year	Initial phase investigation	Formal investigations	Complaints issued [1]	Consents issued	IP closed without action	FI closed without action	Litigated order
1966	NA	[2] 81	4	68	NA	NA	0
1967	NA	[2] 159	1	6	NA	107	0
1968	NA	[2] 73	2	9	NA	46	2
1969	NA	[2] 53	2	11	NA	101	0
1970	NA	[2] 36	6	6	NA	152	2
1971	NA	[2] 18	1	9	NA	31	0
1972	NA	9	2	3	NA	19	0
1973	NA	5	0	4	NA	17	1
1974	10	8	0	4	NA	21	0
1975	13	3	0	3	5	NA	0
1976	14	9	1	1	1	NA	1
1977	7	5	1	1	1	1	0
1978	4	0	2	0	1	0	0
1979	11	3	0	4	11	3	0
1980	25	13	1	0	22	8	0
1981	29	8	1	2	23	4	0
1982 [3]	12	1	0	0	12	0	0

[1] The complaints reported under this accounting treat multiple respondents as one, and do not include complaints issued in immediate conjunction with a consent order. Accordingly, the number of complaints reported is smaller here than in some alternative tabulations.

[2] The large number of investigations during this period reflects, in part, the Commission's study of the apparel and food industries, in which a separate file was opened for each company being studied, rather than following the current practice of opening a single file for an industrywide matter.

[3] Data reflects investigations through 6–30–82, and orders through 8–30–82.

NA = Not available.

VERTICAL RESTRAINTS INVESTIGATIONS

Fiscal year	Initial phase investigations	Formal investigations	Complaints issued [1]	Consents issued	IP closed without action	FI closed without action	Litigated order
1966	NA	NA	1	6	NA	NA	0
1967	NA	NA	1	2	NA	NA	0
1968	NA	NA	0	1	NA	NA	1
1969	NA	NA	0	2	NA	NA	0
1970	NA	NA	1	4	NA	NA	0
1971	NA	NA	3	9	NA	NA	0
1972	NA	NA	12	6	NA	NA	0
1973	NA	NA	6	5	NA	NA	2
1974	NA	NA	2	8	NA	NA	2
1975	34	0	3	11	2	NA	2
1976 [2]	44	0	5	13	1	0	1
1977	10	8	1	6	0	3	1
1978	8	5	0	4	2	1	0
1979	27	18	0	10	24	7	1
1980	66	32	1	8	60	12	0
1981	74	11	0	2	60	6	0
1982 [3]	30	0	0	2	30	0	1

[1] Complaints are defined here to exclude multiple respondents and complaints issued in conjunction with a settlement.

[2] This year contains an extra 3 months due to a change in fiscal year definitions.

[3] Data includes investigations through 6–30–82, and orders through 8–30–82.

NA = Not available.

Question 5. **Please provide the total number of orders issued each fiscal year, from fiscal year 1960 to fiscal year 1982, concerning vertical trade restraints and viola-**

tions of the Robinson-Patman Act. In addition, provide the number of orders issued under each applicable section of the Sherman, Clayton and Robinson-Patman Acts for each fiscal year. Further, indicate the number of final orders issued under each section of the Acts during each fiscal year.

ROBINSON-PATMAN AND VERTICAL RESTRAINT CONSENT DECREES AND LITIGATED ORDERS SINCE 1960

Fiscal year	Vertical restraints FTC Act, section 5	Robinson-Patman[1]				
		Section 2(a)	Section 2(c)	Section 2(d)	Section 2(e)	Section 2(f)
1960	2	5	6	33	1	1
1961	1	11	56	18	1	4
1962	0	11	37	24	2	1
1963	0	7	17	225	2	1
1964	0	28	1	81	4	2
1965	2	5	1	32	0	0
1966	7	5	0	65	1	2
1967	2	8	1	9	1	0
1968	2	3	6	3	1	1
1969	2	8	6	0	0	1
1970	3	4	1	2	0	2
1971	9	4	1	7	4	1
1972	6	1	0	2	0	1
1973	7	1	2	1	1	0
1974	10	0	5	0	0	0
1975	13	2	2	3	1	0
1976[2]	14	0	0	1	0	0
1977	7	1	0	0	0	0
1978	4	0	0	0	0	0
1979	11	0	3	1	1	0
1980	2	0	0	0	0	0
1981	2	1	0	1	0	0
1982	3	0	0	0	0	0

[1] Robinson-Patman orders and consents reflected in this table may total more than the number actually issued in a given year because some cases were prosecuted under several different sections of the act.

[2] Cases tabulated for fiscal year 1976 include consents and orders between July 1, 1975, and Nov. 30, 1976.

Question 6. Please provide for each fiscal year since fiscal year 1960, the number of companies named in Robinson-Patman complaints and consent orders. Of these totals, indicate the number of small businesses as determined by Small Business Administration size standards.

In the interests of time we have prepared this chart which partially responds to your request. We are continuing to research this issue and will submit more detailed information for the record as soon as it is available.

SIZES OF RESPONDENTS IN TYPES OF ANTITRUST CASES BROUGHT, FISCAL YEARS 1977, 1978, 1979

Size of respondent[1]	Robinson-Patman	Mergers	Horizontal restraint	Vertical restraint	Total
Over $10 billion	2	2	1		5
$1 to $10 billion	5	15	4	2	26
$100 million to $1 billion		20	1	4	25
$10 million to $100 million		5	2	7	14
Less than $10 million				2	2
Total	7	42	8	15	72

[1] In terms of sales in current dollars.

Question 7. Please state the number of consent orders modified during each fiscal year from fiscal year 1960 to fiscal year 1982.

Order modifications by fiscal year

Fiscal year:	*Number of orders modified*[1]
1960	0
1961	0
1962	0
1963	0
1964	0
1965	0
1966	0
1967	0
1968	0
1969	1
1970	0
1971	1
1972	0
1973	0
1974	0
1975	3
1976	2
1977	0
1978	3
1979	0
1980	2
1981	4
1982	11

[1] This includes both consent orders and litigated orders.

Question 8. Please give the number of consent orders currently in effect. Of these, the number presently under review or designated for review and possible modification.

Approximately 1800 of the Commission's competition orders are currently in effect. Our records would not show which of these were consent and which were litigated, but people familiar with this part of our work estimate that consent orders are approximately 65 percent of the total. In this case there will be about 1200 such orders outstanding.

In principle all of these orders are subject to review and possible modification. The Bureau of Competition has been considering three specific review projects, however, which are now awaiting action by the Commission. These are briefly described below.

Review of Pre-Finality Act Clayton Act Orders.—This study would determine whether Clayton Act orders issued prior to the effective date of the Finality Act, which provides modern civil penalty procedures, have sufficient deterrent effect to warrant further enforcement by the Commission. Approximately 440 orders are of this type.

Review of Final Orders.—This project would determine whether any existing Commission orders could have anticompetitive effects that would warrant modification. A pilot project to develop a methodology has been completed and is pending before the Commission.

Review of Orders With Perpetual Acquisition Moratoria.—We have forwarded to the Commission a recommendation for a review of orders that contain perpetual requirements for the prior approval of acquisitions. There are seven such orders.

Federal Trade Commission,
Bureau of Competition,
Washington, D.C., October 21, 1982.

Janet Lachance,
Counsel, House Small Business Committee, Rayburn House Office Building, Washington, D.C.

Dear Ms. Lachance: When Tom Campbell testified before your Antitrust Subcommittee last month, we promised additional information on the number and respective sizes of companies charged under the Robinson-Patman Act. That information is contained in the attached table for 1960 and selected years beginning with 1970.

We hope this information meets your needs. If you have any questions, do not hesitate to call me at 523-3696.

Yours truly,

WINSTON S. MOORE,
Acting Assistant Director.

Attachment.

Question 9. Please provide for each fiscal year since fiscal year 1960, the number of companies named in Robinson-Patman complaints and consent orders. Of these totals, indicate the number of small businesses as determined by Small Business Administration size standards.

In the interests of time we have prepared the following chart which gives you the requested information for selected sample years since 1970. We hope that this will be sufficient for your purposes.

SIZE OF RESPONDENTS IN ROBINSON-PATMAN CASES

Fiscal year(s)	Annual sales of corporate respondents (In millions of dollars)				
	Less than 10	10 to 100	100 to 1,000	More than 1,000	Not available
Respondents in consent decrees and litigated orders: [1]					
1960	1	4	5	3	[2]54
1970	1	1	3	0	2
1977 to 79	0	0	0	4	0
1980 to present	0	0	0	1	[3]9
Respondents in current investigations and pending cases: [4]					
Current	0	0	5	15	[5]4

[1] This table reflects the size of respondents to FTC consent decrees and litigated orders measured by annual sales of the respondent or its parent entity in the year of the decree or order. The table does not reflect the size of unincorporated persons or partnerships because such information is in most cases unavailable. The numbers of respondents listed in the table for each given year may sum to a number different from the total number of consents and orders in the year because of the absence of unincorporated respondents and the fact that orders frequently list multiple respondents.

[2] Corporate respondents for whom annual sales figures were not found in Moody's Investor Service in the year of the order or decree are reflected in the "Not Available" column. These companies are not listed on any national or regional exchange, and are typically, although not always, small closely held companies. For examples, 23 of the 54 respondents from 1960 for whom data were unavailable were small auto parts jobbers. Thus, the fact that the vast majority of respondents in 1960 decrees and orders were not listed on an exchange may fairly be viewed as an indication that many of them were small companies.

[3] Eight of the nine firms listed here were multiple respondents in a single case.

[4] This table reflects the size of respondents in current FTC investigations or cases in litigation which had not reached a final decision as of July 1, 1982.

[5] Three of these are privately held companies (see note 1) and one represents an industrywide investigation.

Mr. LUKEN. Mr. Campbell, would you say that your position on vertical price maintenance is the same as that of the Justice Department?

Mr. CAMPBELL. I will answer that as best as I can, but I must obviously say that Assistant Attorney General Baxter must speak for himself. My feeling on vertical restraints——

Mr. LUKEN. But we must interpret both of you, so maybe you could give us a little help. Since you are both involved in the same area.

Mr. CAMPBELL. Yes.

Mr. LUKEN. If you can't tell us that your interpretation is the same, then I, for one, might just assume that it is not.

Mr. CAMPBELL. I was merely giving a preceding comment that I would hope Assistant Attorney General Baxter would say before he ever tried to characterize one of my beliefs, that he surely is the one to be consulted on it.

Mr. LUKEN. And I just gave the predictable response.

Mr. CAMPBELL. I think there may be differences. Here is how I would see my view on vertical pricing restraints: If there is a case which violates the law where there is an agreement on resale price maintenance, for example, that is a vertical restraint, we have a per se violation of the law.

All I am telling you is that before I would go ahead and prosecute that, I would ask whether prosecuting would do more harm than good. That is to say, I would ask whether this prosecution might result in harm to competition.

Mr. LUKEN. It sounds like you agree with Mr. Baxter.

Mr. CAMPBELL. That may be right, but let me get to the conclusion, and perhaps you might form a different point of view. If I am convinced that the case violates the law and it does not have any detrimental effect on competition to bring the case, I will do so.

Mr. LUKEN. You know, you have had an opportunity to testify, so I don't mind interrupting you. Doesn't that make you a law unto yourself?

Mr. CAMPBELL. No, not at all.

Mr. LUKEN. It is a pretty general guideline that you have.

Mr. CAMPBELL. The Congress gave us the guideline, Mr. Chairman, the Congress said we may not bring any case unless it is in the public interest. In giving us that, and the legislative history does support this, they asked the Federal Trade Commission to serve as an expert body. All I am saying is that I will not bring a case if I am convinced it harms competition, even though there might be a technical violation of the law.

Mr. LUKEN. Even though that case, if you brought it, would be totally consistent with Supreme Court decisions?

Mr. CAMPBELL. In the case——

Mr. LUKEN. If you disagreed with that Supreme Court decision, you wouldn't bring it, because you do not believe it is in the public interest. That is just what you have said.

Mr. CAMPBELL. Not precisely, if the chairman would allow me to delineate the difference. The Supreme Court surely does tell us what is the law. The Supreme Court has stated that resale price maintenance is per se illegal.

I am merely saying that among all violations of law, and any honest prosecutor will tell you this, Mr. Chairman, among all violations of the law, I choose which to recommend on the basis of where I can do the most good. I do not recommend one in those instances—and I am not suggesting they are many, and I am telling you I haven't done it yet—where it is possible that resale price maintenance prosecution might hurt competition, and then I won't recommend it.

Mr. LUKEN. Well, we haven't the caseload, and you haven't brought it up until this moment. We certainly aren't talking about caseload, we are talking about the very real, substantial differences of opinion which Mr. Baxter has stated very clearly on a number of occasions where he differs with the Supreme Court, and he doesn't intend to prosecute these cases, even though the law tells him to, and the Supreme Court tells him to.

Let us put aside the question of whether or not you have got a problem of caseload. Can we do that?

Mr. CAMPBELL. Surely.

Mr. LUKEN. Now, Mr. Miller, your superior, seems rather clearly to agree with Mr. Baxter. I have here one report that says that he supports, I mean one newspaper report in which he is quoted as saying he supports price maintenance. It says here that the FTC chief pointed out that most manufacturers practicing resale price maintenance do so because they believe the higher price that results places a product in a quality category that will increase demand. Such practices for that purpose, he said, are acceptable. Now, this isn't in quotes, but assuming that he did say that, would you agree with that?

Mr. CAMPBELL. Assuming he said that, I would not agree with it. I would have added several important qualifications. I would have said that even if the manufacturer thinks that resale price maintenance is in the manufacturer's interest, that does not end the analysis at all.

If it exists, it violates the law. We should prosecute it, unless we are convinced that to do so would harm competition. It might be useful, and Mr. Chairman, direct me where you wish me to direct my attention to, but it might be useful to suggest such an instance. I am not saying this happens every day, but there are instances when, in order to gain entry into an area of competition, a new firm—and this is frequently a small firm, but not always—will attempt to establish for itself a dealer network, where there are already existing established manufacturer products handled by those dealers.

In order to gain entry, to gain a market share, not to go from 10 to 15 percent, but to go from zero to 1 or 2 percent, the manufacturer is confronted with the dealer who says, "Not unless I can be sure of a price."

In that instance, I would ask rhetorically—it is my position to answer questions, if I can, not to ask them—rhetorically, "Is competition hurt or helped if we prohibit a new manufacturer from entering the market in such an instance?" Technically, he is insisting on resale price maintenance. Technically, he may be violating the law. I am suggesting that there are some circumstances when a good prosecutor will not prosecute every violation of law.

Mr. LUKEN. I hope you are not saying what I think what you are saying in that instance, that it is not a violation of the law in your view.

Mr. CAMPBELL. It would be one way of describing it. If you believe, and I appreciate the suggestion. If you believe it is not a violation of the law——

Mr. LUKEN. I am not agreeing with you, but I just want to make sure what you are saying.

Mr. CAMPBELL. I can use all the help you have to offer.

Mr. LUKEN. Just for my imperfect understanding.

Mr. CAMPBELL. If you are suggesting that it wouldn't be a violation of law, I might say that it would not be a violation——

Mr. LUKEN. Well, what I thought you were saying——

Mr. CAMPBELL. Then let me just speak for myself.

Mr. LUKEN. In effect——

Mr. CAMPBELL. Just speaking for myself, perhaps in such an instance——

Mr. LUKEN. Let me amplify. I wouldn't ordinarily think that you could ignore any violation of the law——

Mr. CAMPBELL. Of course not.

Mr. **Luken.** Unless it was a de minimis proposition or unless you had a caseload problem. Obviously, if you do not have the resources, you cannot bring all the cases. But I thought we had put them aside.

Mr. **Campbell.** We have, and I have not mentioned it.

Mr. **Luken.** I know you have not. Therefore, I think what you are saying is that in your opinion you should not prosecute a case if it is not in the public interest even if it is a violation of the law. I think you have just explained that your interpretation is, that even though an action might be considered a "technical violation," it is not an actual violation because it is not anticompetitive. Is that basically what you are saying?

Mr. **Campbell.** You put it quite clearly. I would only add one point, and that is: Our statute requires the public interest, a private plaintiff does not. So a private plaintiff might go into court and win that lawsuit, because it would be against the law. There is that ambiguity as to what is against the law. But we should not bring it, because it would not be in the public interest.

Mr. **Luken.** In my opening statement, I quoted Judge Learned Hand, or intended to. I was abbreviating it. Judge Hand stated that one of the purposes of the antitrust statutes was to perpetuate and preserve an organization of industry in small units.

Now, is it your position that the legislative history of the antitrust statutes and the Supreme Court interpretation of those statutes dealt purely with economic efficiency?

Mr. **Campbell.** No. It is not. I believe the legislative history demonstrates a commitment to just those principles Judge Hand referenced.

Mr. **Luken.** Well, then I would have to agree with you. I wish some of the other people in your shop and in the Justice Department would agree with that. Now, as you know, some sections of the Robinson-Patman Act do not require a showing of harm to competition. Would you enforce those provisions, even without a showing of harm to competition if it is done to a point that we were just discussing?

Mr. **Campbell.** The answer is really the same as I gave before. In point of fact, I am. We have cases presently being prosecuted under those sections. But to give the chairman a complete and honest answer, I wanted to be sure before bringing those cases that I wasn't doing more harm than good. I was so convinced, and so we are prosecuting.

Mr. **Luken.** Now, I might point out that as far as the folks that we have heard from this morning, I assume you heard from them? You heard their testimony. They have testified that there is no lack of price discrimination in the marketplace today.

Have you recommended any Robinson-Patman Act complaints to the Commission? I don't know whether I got your testimony right.

Mr. **Campbell.** Not complaints, but initiated investigations. I have not yet had occasion to recommend a complaint. There was one instance where a complaint had already gone forward in a previous administration, had been withdrawn for consideration of consent, and came back to the Commission. But it has not yet been presented.

I do, however, have the numbers I told you about initiating.

Mr. **Luken**. How long have you been aboard?

Mr. **Campbell**. Since October 13 of last year.

Mr. **Luken**. Isn't that unusual that as far as the records of the Commission are concerned, that you haven't recommended a complaint in a year's time?

Mr. **Campbell**. Not at all, Mr. Chairman. I have initiated, as I said, a number of cases. They require careful preparation of just the sort of evidence that, in your colloquy with the druggists, you discussed, and none of those have come forward.

There are, however, six docketed cases which are pending; one is in trial, so I don't need to recommend that for a complaint. I am pursuing the trial, the complaint that was already ordered. One is awaiting trial, and I shall try it. For, one we have been able to negotiate a consent, which I believe is adequate; one we are recommending that consent to the Commission; and the other, we are still considering negotiations, and the remaining two, we have argued, and they are pending for Commission decision.

Mr. **Luken**. I am not sure, but I don't think you have addressed the question. We are talking about bringing a complaint before the Commission.

Mr. **Campbell**. And I tried to respond, Mr. Chairman, that it takes time, and that it is by no means unusual that since October——

Mr. **Luken**. It takes time if you want to start from the beginning of initiating investigations. I assume that when this Administration took over, there were investigations that were in progress.

Mr. **Campbell**. Not many. There were some. If the chairman heard my testimony——

Mr. **Luken**. Would you tell us about it?

Mr. **Campbell**. Surely. The chairman heard my testimony. This administration has initiated more Robinson-Patman investigations than the prior administration, and by an order of magnitude. The numbers that I gave were in Robinson-Patman, we had opened 12, and in the previous year, 31, which is an annual average of 22. In the previous 4 years, the annual average was 15.

Now, I did respond to the question, in that there was one case ready for Commission decision and that had already been issued a complaint, but the consideration was for a consent, and that has now gone back to trial.

Mr. **Luken**. Well, I believe in one of the tables that you have presented to us, one is captioned, "Robinson-Patman Act Investigations."

Mr. **Campbell**. Yes.

Mr. **Luken**. That indicates that there were, in 1980, 36 cases in initial phase of investigation.

Mr. **Campbell**. That is correct.

Mr. **Luken**. Aren't those cases that are in the pipeline?

Mr. **Campbell**. They are. Some were closed before I got there. Some are now in trial. Indeed, the ones that I have mentioned to you include some of those 36.

Mr. **Luken**. But none of them brought by way of formal complaint to the Commission.

Mr. **Campbell**. If you would look at the graph, Mr. Chairman, you will see my point. In 1979, zero complaints issued. In 1980, only one. In 1981, only one. It is not unusual, Mr. Chairman, that so far this year, we do not have any new complaints.

One can look all the way back to the sixties before one gets numbers higher than that, but we are investigating.

Mr. LUKEN. Well, I will ask them after I give Mr. Daub an opportunity. Mr. Daub?

Mr. DAUB. Thank you, Mr. Chairman.

In my legal practice, I spent a good deal of time with franchising operations. I was very much involved with the *Schwinn* bicycle case and its result. I asked a question a little earlier to see if I could get a reaction, the opposite being true with respect to fair trade law, just to see if the witness had some understanding of the field of the testimony that he had read to the committee.

I think that your approach is different from people who have held your office before, and I don't see anything wrong with it. I think what may be the real problem in this whole area is some intemperate remarks on the part of those who are in charge of some of our business, and I will talk to him a little later, about 2 p.m.

But the thrust of what you are trying to tell us, at least to me, makes a great deal of sense. I want to tell you that. I think that it is important to be reasonable and rational, and I am not going to say I agree or don't agree with the following cases, the *GTE* case. I don't know if your interpretation is correct, given the footnote in the actual case itself.

But I don't see anything wrong, as a practitioner, with approaching every single opportunity you get from the point of view that your recommendation ultimately has to be whether or not there will be more harm rather than less harm to the competitive relationship in that given industry.

Now, having said that, what kind of efforts are you making to deal with the druggists, or the direct selling people, or manufacturers, to be sure that even if they do have a complaint, that it is looked at?

Not the complaint you might file or process from prior years before you got your office, but what are you doing to encourage people to bring the ads to you from Denver, Colo., might suggest that there is a problem that is anticompetitive, that may fall within Robinson-Patman?

Mr. CAMPBELL. I would be pleased to answer that as best I can. Three points, it seems to me. The first, and I will get to the others, but first is important. I don't criticize the statute at all. I don't make the comments that one ought not be pursuing the statute.

Secondly, we had initiated an outreach program in the Bureau of Competition in the following way: I have 10 offices, each one with about 15 attorneys. I assigned one attorney per office for a full month to do nothing but that outreach; generate cases, contact plaintiffs' lawyers—they are a good source of cases—contact trade associations, make connections with the State attorneys general, who receive a lot of complaints.

The purpose being that if one person was assigned that task, it might get done. If everyone was assigned the task, then no one would do it. Case generation is not important, it might have seemed, as winning a case or trying one.

Well, to me, it is even more important. Even if we bring investigation after investigation, and it doesn't lead to a complaint, we are there, we are looking into it, we are watching over the area. And there is some good being done by that. So that project was initiated by me and has led to a number of very fruitful investigations.

Thirdly, and the particular points mentioned, we have a case pending—and I cannot discuss it in public, but within appropriate safeguards, I would be happy to communicate with you—involving the druggists' problem with a particular manufacturer of grooming care which, just as the witness described, was giving more advantage to the larger than to the small. We pursued that case, and I believe we will have a successful consent, the companies not wanting to go to trial.

The final point I would make is that in every opportunity I can, I accept to meet with, be it either in a speech-giving context or in a "come to my office and talk" context, with representatives of small business.

Mr. **Daub**. So you are not ignoring the illegality per se, but you are saying that in a different view, even though you don't have much opportunity, clearly, for the numbers, to make that decision one way or the other, you are going to try to apply a standard, not of prosecutorial discretion, but a standard of merit to a case as it may require the resources of Government to focus on a given anticompetitive argument.

If it is technically—I think that is the word you used—a violation, but in fact, to prosecute it would—now, you are not saying use up too much of the Government's resources, you are saying would be anticompetitive.

Mr. **Campbell**. I am——

Mr. **Daub**. You are saying that this little guy could get in there? He could maybe force these big guys to give better prices to the consumer?

Mr. **Campbell**. Amen. And if the little guy gets in there by reason of resale price maintenance, then the economy is improved, competition is improved, and the little guy is improved.

Mr. **Daub**. Where did you go to school, for your undergraduate school?

Mr. **Campbell**. The University of Chicago.

Mr. **Daub**. And where did you do your graduate work?

Mr. **Campbell**. I received my doctorate in economics from the University of Chicago. I received my law degree from Harvard University.

Mr. **Daub**. Harvard. And what did you do before you got this job?

Mr. **Campbell**. I was Executive Assistant to Deputy Attorney General Edward Schmults. Before that, I was a White House fellow. It was my pleasure and honor to serve Jack Watson, who was chief of staff for President Carter. And before that, I was in private practice at Winston & Strawn in Chicago, Ill.

Mr. **Daub**. So you have served under two administrations then, in Government, and had some private practice as well.

Mr. **Campbell**. I did, and before private practice, I was law clerk to Mr. Justice White, whose concurrence I cited in my testimony.

So I wasn't attempting to mischaracterize the Court's opinion, but merely to point to Justice White's.

Before that, I was a law clerk to Judge MacKinnon on the U.S. Court of Appeals for the D.C. Circuit.

Mr. **Daub**. I am most impressed. Thank you.

Mr. **Campbell**. Thank you, sir.

Mr. **Luken**. Well, in effect, since you give yourself that out in the public interest, that you are not going to bring the case if, despite the fact that it is a per se violation, then you are saying that you are going to make the decision because of what I would consider to be the shortrun effects in that individual case. Right?

Mr. **Campbell**. No, sir.

Mr. **Luken**. You really can't predict the long run, can you?

Mr. **Campbell**. It is very difficult to predict the long run in any enterprise.

Mr. **Luken**. It seems to me that Congress has laid down the principle as embodied in the law, that regardless of what you believe to be the shortrun effects in this particular case, the per se price maintenance is illegal, and therefore is actionable by the Federal Trade Commission.

Mr. **Campbell**. That is not entirely true. It is illegal and actionable by a private party, but actionable by the Federal Trade Commission only if such action is in the public interest.

Mr. **Luken**. That is certainly a broad interpretation of public interest.

Mr. **Campbell**. With respect, I only intend to avoid bringing cases which do more harm to competition than they would do good.

Mr. **Luken**. What does that "in the public interest" modify? The whole act?

Mr. **Campbell**. The bringing of a complaint, Mr. Chairman.

Mr. **Luken**. Is that "in the public interest" in other congressional acts?

Mr. **Campbell**. No; it is not. I was referring to the Federal Trade Commission Act, which is the way that we enforce the resale price maintenance aspects of the Sherman Act.

Mr. **Luken**. It seems to me that you have come to the same conclusion that Mr. Baxter has, though we both suspect that you really differ, but that you can come to the same position as Mr. Baxter, who says he differs with the law, and he differs with the court interpretations.

But you don't have to do that, you just have to say that "I have got an out, because I am interpreting the public interest."

Mr. **Campbell**. If you ask any person with a prosecutorial job, I am sure they would tell you that they make that exact same calculus.

Mr. **Luken**. Well, I had a little experience myself as a prosecutor, a U.S. attorney, and I never interpreted my discretion in that way at all.

Mr. **Campbell**. With respect——

Mr. **Luken**. There were many cases that I brought that I didn't agree with, but I thought the law told me that I should.

Mr. **Campbell**. I would be very disappointed if I learned, however, that the chairman brought a case which you knew would harm competition if you were administering a statute which is supposed to help competition.

Mr. **Luken**. You interpret that he has that broad of a latitude?

Mr. **Campbell**. I meant the chairman, meaning you.

Mr. **Luken**. Oh. Let's go back.

Mr. **Campbell**. You just told me about your prosecutorial background, and I said I would be very disappointed if you, Mr. Luken, had brought any cases that hurt competition under a statute that was supposed to help competition.

Mr. **Luken**. Well, I didn't bring many competition cases. I was analogizing broader than that. Oh, you meant any prosecutor of——

Mr. **Campbell**. Anyone with prosecutorial authority.

Mr. **Luken**. For Robinson-Patman cases?

Mr. **Campbell**. Anyone with prosecutorial authority has to decide which cases, not on the budget, since that is another issue. We have put it off to one side, though it is a real one, but on the basis of what good it would do.

I would suspect that when you were a U.S. attorney, you also adopted that rule.

Mr. **Luken**. No, I suspect I did not.

But I did have a couple of questions here that I want to get in the record, and we are running out of time, and for now I will simply leave it as far as my observation is concerned, that I think your interpretation of public interest really destroys your prosecutorial bent, and would prevent you from carrying out the law, and I don't think the Congress had such a broad intent, because I believe you come to the same conclusion that Mr. Baxter has come to, as I have stated. I don't want to say a little more honest—because I am not really looking at the motives—but more consistent in his approach, where he admits that he disagrees with the law, and he disagrees with the decisions.

You are saying that you have some sort of a fantasy that being in the public interest gives you that complete discretion, so you become completely subjected by just attaching the "is it procompetitive" label to it, that you can ignore any violations if you think it is procompetitive, or that it is not anticompetitive.

Mr. **Campbell**. I would disagree with the chairman's characterization.

Mr. **Luken**. You disagree with my conclusion; you can disagree with the whole process.

Mr. **Campbell**. I would disagree that I operate under a fantasy.

Mr. **Luken**. I understand. Taking away the characterizing word there, you do operate under the basis, as you have stated, that in the public interest gives you the right to ignore any case if you come to the conclusion that in that case, in your opinion, would be anticompetitive.

Mr. **Campbell**. I suppose the way to put it most succinctly is I would not consider myself faithful to my office if I brought a case that I knew to be contrary to the public interest. If that is cause for the chairman to criticize my enforcement, so be it.

Mr. **Luken**. In my view, at that point, you have a choice, all right. You can either bring the case or resign. In your view, you can either bring the case or not bring the case.

Mr. **Campbell.** In fact——

Mr. **Luken.** You don't decide the public interest, but we do.

Mr. **Campbell.** The Federal Trade Commission is empowered by Congress to decide the public interest.

Mr. **Luken.** Then you don't have to worry about laws. We will just say the Federal Trade Commission has jurisdiction over these matters, and they can just decide questions in the public interest. Did we adopt any other laws? What is the need for the rest of them?

Mr. **Campbell.** The standards are quite narrow. We do not, for example, consider whether a case would benefit the balance of trade of the United States, or whether perhaps, an action would increase employment. All of these are important matters for the Congress.

The Congress gave to the Federal Trade Commission one area in this particular milieu, and that is competition.

Mr. **Luken.** The Congress passed legislation, when was it, in 1975. Is that right? It repealed the fair trade laws?

Mr. **Campbell.** The Miller-Tydings Act, yes.

Mr. **Luken.** That is what we are talking about. Fair trade laws were price maintenance, weren't they?

Mr. **Campbell.** Yes, sir.

Mr. **Luken.** So we got a little more specific than just telling you to decide in the public interest what was competitive, didn't we? Because you are dismissing it completely just because you decide that it isn't in the public interest.

Mr. **Campbell.** Again, with respect, I disagree. When Congress repealed the fair trade laws, Congress expressed the opinion that the previous existing law would take up, whereas previously, there had been an explicit exemption from the antitrust laws, and a per se legality for fair trade. With the removal of that per se legality for fair trade, the law returned. And the law that returned was the Supreme Court-given law that per se, resale price maintenance is illegal and that the Federal Trade Commission was to enforce the law under the standards that I have just described, which includes public interest.

To my reading, Mr. Chairman, that is an honest enforcement of congressional intent.

Mr. **Luken.** Well, I am sure that is honest as far as you are concerned. But I don't know that it is consistent or a faithful one to the law as I interpret it.

I had a couple of questions that Mr. Bedell wanted to ask.

In its analysis of the proposed merger between Mobil and Marathon, the FTC noted the importance of independent marketers and retailers of gasoline. Would the Commission take action now if it had reason to believe that the continuing viability of the independent retail sector of the gasoline marketplace were threatened by the unlawful and predatory conduct of one or more of the large integrated oil companies?

Mr. **Campbell.** Yes, Mr. Chairman, in fact we have an investigation right now into that issue.

Mr. **Luken.** Can you tell us any more about it?

Mr. **Campbell.** I would not like to tell the name of the company, but it does involve a claim of predatory practices, a claim of treating the independent, small retailers in a way not equal to the retailers by the branded chain itself.

Mr. LUKEN. Mr. Bedell's subcommittee has received, recently, several complaints that one of the major oil companies is selling gasoline for retail on the street for prices that are equal to or lower than the prices it is offering to its wholesale customers. I assume that is the station than to the dealers. Would this be a matter of concern to the FTC?

Mr. CAMPBELL. It would be, and it is.

Again, we have an investigation in that area. And I believe it was in response to the same situation that the Congressman describes.

Mr. LUKEN. It is not a new situation, is it?

Mr. CAMPBELL. Well, it comes and goes. This particular investigation started because of a practice a particular company began recently, but the question of treating discounters differently or independents differently is one we have had for quite a while.

Mr. LUKEN. All right. Well, I have another one here which I will submit to you in writing, because there are certain obligations which we have to take care of between now and 2 p.m., when we are scheduled to reconvene.

So the committee then will stand adjourned until 2 p.m. We thank you very much, Mr. Campbell, for your testimony, and if in the exchange there has been any misunderstanding, why, I hope that it has been cleared up.

Mr. CAMPBELL. You are very courteous. Thank you, Mr. Chairman.

Mr. LUKEN. Thank you.

[Whereupon, at 1:15 p.m., the subcommittee recessed, to reconvene at 2 p.m., the same day.]

AFTERNOON SESSION

Mr. LUKEN. The subcommittee will come to order.

Our next witness is Mr. T. C. Wilkinson, president of National Marine Electronics. We have your prepared testimony and, without objection, that will be received in the record of the committee and you may proceed to tell us what you think about the subject in any way you see fit.

TESTIMONY OF THOMAS C. WILKINSON, JR., PRESIDENT, NATIONAL MARINE ELECTRONIC DISTRIBUTORS, INC., LAKE CITY, S.C.; ACCOMPANIED BY CHARLES PRICE, COUNSEL

Mr. WILKINSON. Thank you, sir.

I first want to point out that I am not a theoretician and not a politician.

Mr. LUKEN. You are not what? I didn't get that.

Mr. WILKINSON. I am not a politician and I am not an expert in the matter at all.

Mr. LUKEN. We are not going to relieve you of any responsibility. I will say that at the outset.

Mr. WILKINSON. I don't have wisdom in the matters of law, but I do in the way of my own business, of course. I feel that I do. I bring you testimony from the field, so to speak.

Without going into the background of myself or my company, I am going to skip some of the testimony and go straight to the point, some of the problems that I have encountered with manufacturers and/or dealers who we compete with.

My company is a direct mail-order company. We have a catalog, which I believe you have a copy of on your desk. I believe you were given one earlier. We mail that catalog nationwide, and we compete with local retail dealers who buy their products from manufacturers. We also buy products from distributors who act as middlemen for manufacturers.

We, for the last 5 years, have been constantly barraged with a number of problems in the way of antitrust and price fixing by various manufacturers. Some of these problems revolve in the following way: We cannot buy direct from a particular manufacturer. They do not wish to sell mail order because we discount their products on a nationwide basis. We have to go to their intermediate suppliers or the dealers whom they do deal with directly. These dealers have, from time to time, been forced to either stop doing business with us or to sell to us at a much higher price than would normally be available in the open market.

In two particular instances, I have had the flow of goods stopped to me by the pressure put on by the manufacturer to the particular dealers. In another instance we were recently, as of last year, appointed as a direct dealer for a manufacturer. This manufacturer pointed out in the beginning that he felt like they were going to receive an extreme amount of pressure from their dealer network on a nationwide basis—these are retail dealers—once the word got out that they were selling us direct a discount on a nationwide basis.

Lo and behold, 3 months later, the word was out and the dealers were in an outrage and complaining bitterly to the manufacturer about supplying us because we were selling at a discount price. At that time, the manufacturer called us up and told us that we had to take the prices out of our catalog because the dealers could not compete, or were not willing to compete, with our discounted prices. I must point out that the dealers were paying the same price that we were.

After we took the prices out of two particular products in our catalog on our next print run, the manufacturer called up again and said, "We are very sorry, but that did not stop the number of complaints that were coming in from these dealers, and we are going to have to cut you off completely." They did so.

That same particular manufacturer, when he originally set us up, said that since you are not a legitimate dealer and you do not have retail, walk-in service on the stop—we are in a very rural part of the country so, as a mail-order company, it has no bearing at all in that we are not located on a coastal area where there is retail, walk-in traffic—we are going to assess a 2 percent penalty on the price you are paying for a particular product, which, in this case, was a marine radar set. They disallowed us to be a warranty service center, even though we had the qualified FCC licensed technicians on board to become such.

If you will bear with me, I get carried away with this one particular manufacturer because we have numerous problems with them.

There are other instances with various manufacturers, and they are not the only ones. When it comes to advertising price in national publications, these same manufacturers would not allow me to advertise the price for the product in the national advertising. They said, "You cannot do it." In one particular instance, I asked if I could advertise it because we offered lease programs with our products where we could lease it. They said that as long as you are disguising the prices you are selling at through lease payments and my competitors, their dealers, could not arrive at what I was actually marketing the product for, you may advertise a lease payment price because it was disguised with interest and handling charges and everything else. So they had no objection to that. They would not offer me the cooperative advertising program that was offered to all the other dealers on a nationwide basis.

So we were severely restricted in the ability to market the product and take it to the consumer and offer the very best price that we felt that we could, either from discounting or extra discounts. So they would not allow to us what they would allow on penalties to the other dealers.

The next point is that the manufacturers, in light of the numerous complaints that have been surfacing by competitors like myself and competitors in the mail-order business, have now begun to disguise some of their attitudes and activities in restricting the flow of goods through their new warranty contracts or contracts with suppliers, who, in turn, supply us. We don't buy, in many cases, direct. They are discriminatory toward mail-order discount houses. They aim directly at them, or the warranty contracts are aimed in such a way that in order to have the warranty in effect, they must be signed off by an authorized dealer. That means that I cannot buy the product from a middleman, an authorized dealer, at a wholesale price and offer it back to a customer and have the warranty in effect. They, in turn, chose to void the warranty if the product flows in that direction. That means discount houses cannot have it.

We have on numerous occasions—on one particular factory problem we had, we went to the Federal Trade Commission to voice our concerns and to ask for help. We didn't have any success there at all. In fact, they shuffled us over to the Justice Department. The Justice Department received all the documentation that we could supply. They, in fact, indicated that unless we could give them a court case with all of the information provided, they really weren't interested in it.

Mr. LUKEN. Perhaps you have given us the gist of your testimony. Is there any special point you want to add? Then we will see whether the members have any questions.

Mr. WILKINSON. If you will allow just a minute for me to gather my thoughts.

Mr. LUKEN. All right.

Mr. WILKINSON. I believe that does it. I am sure that any questions you have may enlighten you further.

[Mr. Wilkinson's prepared statement and attachment follow:]

PREPARED STATEMENT OF THOMAS C. WILKINSON, JR., PRESIDENT, NATIONAL MARINE ELECTRONIC DISTRIBUTORS, INC.

Good morning. First, I would like to take this opportunity to sincerely thank the Committee for inviting me to testify here today. As a small businessman, directly engaged in the ongoing daily competitive struggle to survive, make a profit, and grow, I welcome this opportunity to relate my experiences and thoughts concerning the critical need for renewed vigorous enforcement of the federal antitrust and trade regulation laws.

My name is Thomas C. Wilkinson, Jr., and I am the founder and president of National Marine Electronic Distributors, Inc. of Lake City, South Carolina, a national mail order retailer specializing in the sale of marine electronic devices such as depth sounders, ship to shore radios, radars, and LORAN receivers.

I have spent all my adult working life in various aspects of the marine market. I hold a Coast Guard license to operate ocean going passenger vessels up to 100 gross tons up to 100 miles offshore, and, immediately prior to founding National Marine served as the national sales manager for a major marine electronics manufacturer—Gemtronics, Inc.

During my employment with Gemtronics, first as a salesman, and then as national sales manager, I perceived a very real need for a national mail order retail business specializing in marine electronic devices, and offering consumers expert advice, prompt and efficient service and a broad choice of products, at fair, competitive prices.

National Marine was "born" in July 1977, in Lake City, South Carolina employing one other person in addition to myself. First year sales totaled $45,000. Since then, and despite continuous efforts by the marine electronic manufacturers to restrict our sales, we have grown steadily. Today National Marine occupies its own building of approximately 3,000 square feet, employs 15 people, and in the fiscal year ending August 31, 1982, had total sales of $4,500,000.

National Marine's continued success is directly dependent upon three principal factors:

1. Our ability to offer consumers the products they want;
2. Our ability to remain price competitive; and,
3. Our ability to provide our customers with the services they demand.

Service, of course, is almost wholly within our control, and I believe that our market success to date demonstrates National Marine's ability and willingness to provide our customers with the services they need.

Availability of products and the ability to remain price competitive is quite another story and is virtually totally within the control of the companies that make or import the products we sell.

As a relatively new entrant in the world of marine supplies retailers, offering consumers throughout the country—often for the first time—discounted prices for often expensive—but usually necessary—equipment, National Marine finds itself locked in an ever-increasing and continuous battle to remain in business—not in the traditional and normal sense of competing for the consumer's dollar—but in a behind-the-scenes struggle to overcome and free itself from unjustified and discriminatory restraints imposed by manufacturers, often with the connivance and almost always at the urging of our so-called "legitimate" competitors.

These manufacturer's restraints have taken many forms, and there are undoubtedly many that we have not yet seen. To date, the following types of restraints seem to be the most popular:

1. Refusals to deal directly either as to the whole line, or selected parts of the line, and refusals to deal with wholesalers or retailers who resell product to us;
2. Refusals to extend all price discounts either to us or to our suppliers;
3. Refusals to supply promotional services and programs;
4. Imposition of restraints as a condition of sale, such as demanding that National Marine not advertise its selling price for a particular product; and,
5. One of the more recent restraints, changing the terms of the manufacturer's warranty to void it if the product is bought from a mail order retailer.

We have managed to achieve a minor degree of relief from these restraints by "jawboning" the manufacturers and by legal actions. Every attempt to solicit the assistance of the Federal government, however, has fallen upon polite but deaf ears. Moreover, the Federal Trade Commission's well known lack of interest in enforcing the Robinson-Patman Act, and Assistant Attorney General Baxter's repeated statements supporting so-called "vertical" manufacturer restraints have most certainly added fuel to the fire.

The underlying reasons for the very existence of the antitrust laws have not changed in the past few years. "Traditional" marketers with substantial market shares still resist competition by putting pressure on their suppliers to either stop dealing, or deal only on a discriminatory basis with new and innovative challengers, and suppliers still succumb to these blandishments. It is often difficult to prove such "horizontal" agreements or pressures, but we all know that they exist.

The net result of these activities, regardless of the legal technicians theories of "price" versus "non-price" restraints, is always the same—the market price to the consumer is raised, stabilized, and maintained.

I very strongly believe that the American consumer needs and deserves freedom of choice, and is entitled to purchase the products he needs at whatever combination of price and services he desires. No one vendor can be all things to all men. Each of us appeals to a particular market and should be allowed to seek out that market free of all artificial and counter-productive restraints, regardless of whether they are characterized as "vertical" or "horizontal."

Resale price maintenance damages the consumer and strikes at the very heart of my business. Over the years, the antitrust laws as written, and as interpreted and applied by the courts, by and large have acted to fairly protect the interests of business, the consumer, and the economy. But these laws must be enforced in the context of the realities of the marketplace, and not ignored or crippled by the latest theories fashionable with Washington's temporary bureaucrats.

We cannot fight this battle alone. The consumer needs your help, the economy needs your help, and small business needs your help.

Thank you.

Mr. LUKEN. Mr. Daub.

Mr. DAUB. Is this your catalog right here?

Mr. WILKINSON. That is one of them. We print six a year.

Mr. DAUB. Do you have a copy of it there in front of you?

Mr. WILKINSON. I wrote it, so I am familiar with it.

Mr. DAUB. It might be useful if you had a copy in front of you.

Mr. WILKINSON. I will get one.

Mr. DAUB. I have written a lot of things in my lifetime, too, but it doesn't hurt to save time by being sure we are both looking at the same thing.

If you just take, for example, the standard Horizon 78, you have list price, $749.95, and your cost is $529.95. What accounts for that kind of a difference? Is it your volume?

Mr. WILKINSON. If I can give you a history of how that product flows, I think I can show it to you.

Mr. DAUB. All right.

Mr. WILKINSON. The manufacturer would supply that particular product to a wholesaler with a 50 and 10 discount. So, with a 50 and 10 off, you can imagine the net price. I, in turn, buy it from that particular supplier at 6 percent above that particular net cost.

Mr. DAUB. That is 6 percent above that?

Mr. WILKINSON. That is correct.

So it is a 6-percent markup from the net cost from the manufacturer; no freight allowed.

By the way, one of the interesting things of my business is we do a great deal of drop-shipping. So we are really not in an inventory position most of the time, which allows us to realize some cost savings and then, of course, pass them on to the customer.

Mr. DAUB. You don't have a lot on your warehouse shelf?

Mr. WILKINSON. I don't have a warehouse to speak of.

Mr. DAUB. There is no inventory at all to speak of?

Mr. WILKINSON. The inventory I have is generally those returned goods. When the customer chooses not to keep it, he returns it to us and we keep it on the floor until we sell it again.

Mr. DAUB. OK. Go ahead.

Mr. WILKINSON. That particular price, that gives us—effectively, that particular item carries about a 27 to 28 percent gross margin to us. We realize approximately that gross margin; not markup, but gross margin.

Mr. DAUB. If it is a charge like a Visa or MasterCharge, you pay them then probably less than 5 percent?

Mr. WILKINSON. We have a nice agreement with the company. We pay 2 percent.

Mr. DAUB. You pay 2 percent. So you really do understand, don't you, the whole process of discounts and what they mean?

Mr. WILKINSON. Absolutely, in my business.

Mr. DAUB. If you were on the other end, if you were a manufacturer of this standard Horizon 78 and your essential mechanism was a retail trade like through the Sears counter.

Mr. WILKINSON. If I can take a moment to tell you their essential mechanism of marketing those goods is generally called legitimate retail dealers. These dealers are located generally in the seaport areas of the country, along the coastal areas, the Great Lakes and in the west, on the gulf and on the east coast. They sell to those dealers in volume discounts. They also sell to certain wholesale electronic distributors also. These wholesalers buy at large volume discounts and we, in turn, buy from them.

Mr. DAUB. Is it a practical matter of your business. I noticed a moment ago you said you asked if you could advertise the price. Why did you ask?

Mr. WILKINSON. Because the company set me up. This particular company set me up as a buyer of their products with a great deal of reluctance. Some of the things we had to say and do and to agree to to get that product line direct, which we had been buying indirect for a number of years at a considerable higher cost to us. We had to agree to do certain things to get that product. One of them, if you will notice in the rear pages of the catalog in the radar section, we were not able to put in prices. We were also forced to put in competitive products which we didn't normally sell so their dealers could say, "Look, you are selling their products in their catalog, too, so you can't get mad at us."

Mr. DAUB. It is a two-way street, isn't it? I mean you want to try to get these products, too, to have sort of a full line available to your potential shopping customer by mail. If you didn't have certain products, you might not be the quality company in image.

Mr. WILKINSON. We are not so much shooting for image. We want to cover the market and offer it. If the consumer wants it, it is generally in our catalog. If the consumer is not asking for it, you won't find it in our catalog. That is the theorem of mail order.

Mr. DAUB. What if the company just says we are flat out not going to do business with you?

Mr. WILKINSON. They did that just about 6 months ago.

Mr. DAUB. There really wouldn't be anything you could do about it, would there?

Mr. WILKINSON. Yes, sir, there are some things we could do about it.

Mr. **Daub**. What could you do about it if they decide that their policy is x, and you don't choose to abide by x, so they say we are not going to let you carry our product in your book?

Mr. **Wilkinson**. The choice that they made to cut us off was not because of that. We abided by all their recommendations.

Mr. **Daub**. I don't mean to cast it within the framework of the special facts. I am saying hypothetically, then, that if they just choose not to do business with you because they don't want to because you advertise price, for example, and they prefer you didn't, there wouldn't be anything that you would object to about that as a business practice, would there be?

Mr. **Wilkinson**. Yes, sir.

Mr. **Daub**. What?

Mr. **Wilkinson**. Why should I and my catalog have 32 other radios, as an example, showing the price, and then the 2 particular radios, for no reason whatsoever, that I have to state in my catalog, "Call for special prices and availability?"

Mr. **Daub**. Why don't you just not do business with those people?

Mr. **Wilkinson**. Because the consumer, in my opinion, is asking for the product, and we want to sell that product.

Mr. **Daub**. But if that company decides they don't want you to advertise their prices——

Mr. **Wilkinson**. They don't have a right to do that.

Mr. **Daub**. How do you figure they don't?

Mr. **Wilkinson**. I think the consumer demands the right to have that price made available to him at whatever the lowest cost the market can offer.

Mr. **Daub**. Maybe they have got a network of distribution that has relied for years upon a system of cost that is related to their prices and they assume that you are going to be cutting price.

Mr. **Wilkinson**. They assumed correctly, I did cut the price. They knew in the beginning that I was going to cut prices. They later found out that through dealer pressure, they could not in the beginning estimate the amount of pressure they were going to receive. They only suggested or thought there would be some, but they didn't know how much. They knew I was going to put the price in the catalog.

Mr. **Daub**. Would you suggest that if they came to you and said, "This is our price and you can't sell below this price, but you can advertise any other price your want?" How about that?

Mr. **Wilkinson**. I don't quite follow that statement.

Mr. **Daub**. Say you paid $200 for it.

Mr. **Wilkinson**. Correct.

Mr. **Daub**. They said, "One thing is for sure, if you are going to carry our line, you are not going to advertise the price for sale of less than $200."

Mr. **Wilkinson**. I certainly would never advertise it below my cost, if that is what you mean.

Mr. **Daub**. But some might do that, might they not?

Mr. **Wilkinson**. Some manufacturers might say that?

Mr. **Daub**. No. Some sellers might actually try to loss lead products by selling at $198 or $190.

Mr. **Wilkinson**. I am afraid that in my industry, there are not too many people who even know what the term "loss leader" is. I do.

Mr. **Daub**. But wouldn't it be a problem if it is mail order in one context, or profit orientation versus, let us say, a waterfront store that is not mass reaching the market, it just has its walk-in trade and it doesn't get enough of the discounts that you might earn in many other ways, and they decide to sell that product at $200, but you are selling it at $198? You could do that, couldn't you? I mean they couldn't prevent you from doing that once you got the line.

Mr. **Wilkinson**. They could prevent me if I felt like the penalties against me—be it the sword of Damocles hanging over my head—in saying that if you choose to do that, then we are going to cut you off.

Mr. **Daub**. So, if you were the manufacturer of a product, a radar device like you advertise, and they say, "We have two different kinds of distributions built over 40 years of our company's history, dealers, et cetera." Now, you are a mail-order person who wants to come in and you want to advertise a different system that at least makes it appear like your price is better than any of these other people that we have been doing business with for years can sell for. Let's say their markup might be 6 percent, but you can do it and yours technically might only be 3 percent. And they say, "We just don't want that pressure on our old line, 40-year system of distribution, so we are not going to sell you if you don't keep your price above a certain price," you say they can't do that?

Mr. **Wilkinson**. No. If they have not yet sold me, they have the right. As I told this particular company, "I will tell you in advance that every price that I am going to sell your product at is based on the discount you are allowing me. But once you deem that you are going to sell me that product, you will not dictate the price to me." I allowed them, basically, to try the shoe on before they wore it, because I gave them full advance knowledge of what I was going to sell their product for. This particular company was more interested in volume and getting rid of some particular goods and reaching that volume.

Mr. **Daub**. So you subscribe to the use of discounts and volume and best price and free markets; but on the other side, you have an aversion for allowing anyone to say to you you can't sell below a certain price?

Mr. **Dorgan**. Would the gentleman yield on that?

Mr. **Daub**. Yes.

Mr. **Dorgan**. I think we are getting into an area that the next witness, I think, having read part of his testimony, is going to be involved in. But I think you raised an interesting point. I think the framework in which you are asking the questions suggests that resale price maintenance agreements are inherently legal. The fact is, they are illegal at this point. I think that is part of the dialog.

Mr. **Daub**. I am a lawyer and I practice franchise law. Had you been here for the full morning of hearings, you would know I fully understand this area of the law since I practiced it. I am trying to get at his own view of how one thing is legal but something else is not, as he sees it for his business.

Mr. Dorgan. OK. I thought you were framing a classic resale price agreement. If that is what you are framing, those are illegal, and I think that is what the gentleman was trying to say.

Mr. Daub. I certainly am well aware of that. I do appreciate the gentleman's concern.

You are essentially doing business in a resale sense, but in a completely different setting.

Mr. Wilkinson. I am doing it at a distance.

Mr. Daub. Yes. Listen, I am all for you. I am just trying to get at how you figure that the guy you buy from should inherently have one set of standards applied to his pricing to you, but you, in turn, can adopt those same kinds of pricings, discounts and other things, to give better prices to your customers. He may have had a discount system that insures his profit percentages to his sellers long before your unique kind of merchandising came on the scene. Do you follow me?

Mr. Price. Congressman, I think it is very clear that a manufacturer has a discounting system that insures profits to him. What his customers make when they resell that product is their business, not the manufacturer's business. Under our system of laws, at least traditionally and before this year or the last couple of years, once the manufacturer parts with title to goods, the person who has those goods can give them away, can throw them in the trash heap, or can sell them for whatever price he wishes, provided he does not do whatever he does for an anticompetitive purpose.

Mr. Daub. How about taking back the agreement once the person is found that their more traditional avenues of merchandising have been impaired by the price cutter?

Mr. Price. How are more traditional avenues of merchandising impaired when you have free and open competition in the marketplace which traditionally has meant the consumers get the best possible product at the lowest possible prices?

Mr. Daub. But if they yank your contract, that is OK. Right?

Mr. Price. What you are telling me is if someone else sits upstairs and predetermines what prices consumers will pay, and if anyone dares interfere with that, they will be disciplined. That is exactly what has happened to people like Mr. Wilkinson. He has introduced innovation into the marketplace, he has introduced lower prices, he is giving consumers quality products and quality service. The consumers do not have to deal with him, but if they choose to deal with him, Mr. Wilkinson should be allowed to run his business free and clear of interference by people who have no interest whatsoever in Mr. Wilkinson's business.

Mr. Daub. I take it that you were buying some products indirectly, and then ultimately were working very hard to be able to buy them directly.

Mr. Wilkinson. In many cases, we could not in the beginning of our business. No sooner than 3 days after initially deciding to go into business in 1977, my previous employer, from whom we were going to put some of his products in the catalog, called me into his office six blocks away and threatened to run me out of business if I dared put his products in my catalog. We had to go around the horn to get the product.

some things to which a manufacturer could not reach agreements with his distribution system was first introduced.

The law developed in a fairly intuitive way without any particular interest by economists or people who studied the economic effects of business arrangements until well into the 1950's when, in addition to the continued common law development of these ideas in the courts as legal matters, they first really began to be studied and their economic effects questioned. It didn't take very much by way of study to bring about a set of fairly complex conclusions on the part of economists that the intuitive answers that have developed as a matter of law on these practices were in some contexts correct and sound, but in other contexts were having quite unexpected and adverse economic consequences.

So, now the question really is: To what extent will the courts stick with what they have said over the years? Speculating, really, is quite proper to do in the absence of formal evidence, simply because they have made judicial pronounements in the past and those are regarded as precedent. Or to what extent will the courts in the common law mode, in which courts do change their views from time to time, perhaps introduce changes into this body of law to bring it more nearly into conformity with the studies and economic evidence that are now available showing that, although these practices are harmful in some contexts, they are not harmful in others?

I would be happy to talk about any of the particular practices that are of interest to the subcommittee. I would like to say a word on a point that I think involves some confusion with the last witness. If a manufacturer has sold a retailer a particular radar set, to take the example you were talking about, then, as a matter of State property law, it would be true that the manufacturer cannot exercise any control over the way in which he disposes of that particular radar set to which title has already passed. That rule is often summarized with a sort of 17th century flavor by saying that a covenant runneth not with a chattel.

One must not confuse that question or the answer to that question with a very different question. If the manufacturer is displeased with the way the retailer disposes of that particular radar set, may he thereafter refuse to deal with him? The answer to that question was always yes, until the *Dr. Miles* case came along. It is that question to which the antitrust law of vertical restraints is addressed. It is really a matter of relative inconsequence whether the manufacturer can control the disposition of those few goods that will already have been transferred to the retailer. It is a matter of much greater consequence whether their ongoing relationship continues to be one of free negotiation or whether it is one that will be subject to attempts to regulate that relationship, like attempts to control rents or attempts to regulate the airline industry or the trucking industry where there are enormous and complex difficulties.

Let me stop at that point, if I may, with my opening statement, and attempt to deal with such questions as the subcommittee may have.

[Mr. Baxter's prepared statement and additional submissions follow:]

PREPARED STATEMENT OF HON. WILLIAM F. BAXTER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE

I am pleased to be here this afternoon to discuss with you the Justice Department's enforcement policies with respect to vertical trade restraints and price discrimination, particularly as these policies affect the small business community.

Initially, I would like to stress my strong belief that the central concern of antitrust enforcement is protecting the competitive vitality of our economy, a goal that makes it possible for enterprising and efficient business—both large and small—to thrive. The Justice Department is firmly committed to a program of vigorous antitrust enforcement to prevent conduct that threatens competition, while avoiding unnecessary interference with the ability of business to maximize their productivity and efficiency.

Turning first to vertical restraints, I have in recent weeks written to various members of the Congress and the public concerning the Department's position or resale price maintenance, and we have previously submitted a copy of representative correspondence to the Subcommittee.

The effects of vertical arrangements have been the subject of considerable rethinking and analytical refinement over the last two decades. It is clear that vertical distributional arrangements such as territorial restrictions or resale price maintenance may, under some circumstances, be used to facilitate collusion and thus affect adversely horizontal competition. However, lawyers, economists, and the courts increasingly have come to recognize that in most instances vertical arrangements have precisely the opposite effect. Current economic analysis demonstrates that an individual firm's choice as to distributional arrangements, such as the granting of franchises or the grouping of goods and services for sale, may simply reflect its judgment about the most efficient and effective way to structure its marketing efforts. Manufacturers, dealers, and consumers may benefit from the resulting strengthening of competition.

For example, vertical arrangements may be structured to prevent dealers who do not provide services necessary for the effective marketing of the product (services such as point-of-sale information and demonstration, or post-sale servicing and repair services), and who are as a consequence able to charge lower prices, from "free riding" on the services provided by others. In the absence or restrictions to prevent such free riding, there may be an incentive for each dealer to cut back his services and attract customers who have received or will receive those services elsewhere by offering a lower price. Such free riding would ultimately decrease total services provided and hereby decrease total sale of products which require such services—an undesirable result from the standpoint of dealers as a group as well as the manufacturer and, most importantly, the consumer. This effect may occur with respect to a variety of activities, such as advertising, promotion, and maintenance of product quality, in addition to presale services. Elimination of free-rider effects through vertical restrictions may substantially increase distribution efficiency, increase the variety of products available to consumers, and expand the business opportunities of specialized retail outlets.

The Justice Department is sensitive to these considerations. Our enforcement actions against vertical restraints have been rare in recent years, under past Administrations as well as the present one, because we have found very few instances in which such restrictions threatened genuine harm to the interests protected by the antitrust laws. When we receive a complaint about resale price maintenance, we conduct an inquiry to determine whether the particular practice is truly anticompetitive, that is, whether it facilitates horizontal collusion. If so, and if it appears that prosecution of that activity will represent the most beneficial use of Division resources, we will not hesitate to institute an enforcement action. In this manner, we will utilize our limited resources in this area in order to yield the greatest benefits to consumers.

Our continuing realistic approach in this area not only benefits consumers, but also benefits small businesses. It is often new, small manufacturing enterprises that can benefit particularly from vertical arrangements designed to induce competent and aggressive dealers to spend the time and money necessary to develop a retail market for the manufacturer's new product. Moreover, retail dealers, many of whom may be small businesses, can benefit from vertical arrangements that protect their efforts to provide services from free riding by others. Furthermore, needless prohibition of beneficial, efficiency-enhancing vertical arrangements may cause perverse substitution effects particularly damaging to small business. As the Supreme Court noted in *Continental TV* v. *GTE-Sylvania Inc.*,[1] application of a rigid per se standard of liability to solely vertical distribution practices may work to the ultimate detriment of small businesses that operate as franchises, since manufacturers who are denied the means to achieve efficiencies through vertical arrangements may choose to abandon a franchise system in favor of vertical integration. In a legal environment hostile to vertical contractual arrangements, manufacturers will have incentives to distribute their products through owned-outlets even when that distribution arrangement is not economically efficient.

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[1] 433 U.S. 36, 57 n.26 (1977).

GTE-Sylvania, however, held only that nonprice vertical restraints are to be judged by the rule of reason. We believe that this holding should be extended to resale price maintenance as well. We see no basis for distinguishing between price and nonprice restrictions in a vertical context, and we accordingly believe that all vertical practices should be judged by a "structured" rule of reason. Under this approach, courts would consider the type of practice and the characteristics of the product or service involved, and would undertake that factual inquiry only as required to reach a conclusion as to the effect of the practice, in light of the economically sophisticated analysis mandated by *GTE-Sylvania*. In that fashion, overly simplified rules and economically counter-productive results may be avoided without undertaking an open-ended factual inquiry in each case.

Turning next to the area of price discrimination, such activity is in many instances prohibited by the Robinson-Patman Act. The Federal Trade Commission has historically had primary responsibility for enforcement of this Act. The present Administration has continued this practice, and therefore the Department of Justice generally refers to the Commission complaints concerning alleged violations of that Act.

While the Justice Department thus has had little involvement with the Robinson-Patman Act, I would nonetheless like to note that, notwithstanding the conventional wisdom that vigorous enforcement of that Act would benefit small businesses, there is little evidence that enforcement of the Act generally has benefitted small business.[2] Moreover, as Professor F. M. Scherer, a former Director of the Commission's Bureau of Economics, has observed, the FTC has brought many more cases under the Act against small firms than it has against large ones.[3]

Furthermore, the Robinson-Patman Act fosters inefficiencies in distribution by discouraging buyer initiative, hampering promotional activities, inducing a host of inefficient business practices, and compounding uncertainty and rigidity. The Act also tends to insulate monopolists and cartels from large buyer pressure, overprotect competitors from one another, encourage information exchange and other noncompetitive interaction, and create uncertainty about the legality of competitive actions.

In short, the Act inherently injures competition and inevitably results in higher prices that consumers must pay. Differences in prices to different customers usually reflect competitive responses to market conditions, and should therefore generally be encouraged rather than proscribed. The exception to this general rule is where price discrimination reflects predatory pricing designed to obtain or maintain a monopoly. This type of behavior should be prohibited, and the Department of Justice will prosecute such behavior under Section 2 of the Sherman Act—for the good of small businesses and the public alike.

Mr. Chairman, that concludes my prepared remarks. I would be happy to address any questions you or the other members of the Subcommittee may have.

U.S. DEPARTMENT OF JUSTICE,
ANTITRUST DIVISION,
Washington, D.C., August 30, 1982.

Hon. DENNIS DECONCINI,
U.S. Senate,
Washington, D.C.

DEAR SENATOR DECONCINI: I respond to your inquiry dated August 13 about the story which appeared in the Washington Post that morning pertaining to resale price maintenance. As is so frequently the case, the article was extremely misleading, particularly the headline.

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[2] "The State of Small Business: A Report of the President," transmitted to the Congress March 1982, at 176–77. See also Testimony of F.M. Scherer before the House Committee on Small Business, Ad Hoc Subcommittee on Antitrust, "The Robinson-Patman Act and Related Matters, Part 2," 94th Congress, 1st session 144–50 (1976).

[3] "[T]he Robinson-Patman Act was passed to help small businesses. Nevertheless, of the 564 companies named in FTC Robinson-Patman complaints between 1961 and 1974, only 36, or 6.4 percent, had annual sales of $100 million or more at the time of complaint. More than 60 percent had sales below $5 million. Thus, the brunt of the Commission's enforcement effort fell upon the small businesses Congress sought to protect." (F. M. Scherer, "Industrial Market Structure and Economic Performance" 581 (2d ed., 1980).)

There is no portion of the antitrust laws, including those prohibitions against cartel-type behavior with which I most enthusiastically agree, that I would automatically enforce by the commencement of litigation in every single instance in which I was able to identify a technical violation. The resources which Congress provides to the Department of Justice and to the federal judiciary would be squandered by such a mindless approach to any area of law enforcement.

My own attitude toward effective deployment of the resources available to the Antitrust Division is to bring those cases which will yield the greatest gains for consumers. The various areas of antitrust enforcement differ in the frequency with which a case arising in the area will have the potential substantially to benefit consumers. The area of resale price maintenance, like many other areas, is populated by some cases successful prosecution of which would yield great consumer benefits, and other cases which would yield only losses to consumers if successfully brought.

An explanation of my views on which types of practices are harmful to consumers and which types of practices are harmless or beneficial cannot be set forth in a paragraph or even two or three. In order to communicate those views to you, I enclose a copy of a letter which I sent to Congressman McClory several months ago on this same topic.

Sincerely yours,

WILLIAM F. BAXTER,
Assistant Attorney General,
Antitrust Division.

Enclosure.

JUNE 18, 1982.

Hon. ROBERT MCCLORY,
Ranking Minority Member, Subcommittee on Monopolies and Commercial Law, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN MCCLORY: This is in response to your request of June 10, 1982, for a further elaboration of the views of the Antitrust Division on resale price maintenance. The problems posed by the practice of resale price maintenance are exceedingly complex ones. While this may involve repetition of some of the points I have previously made in testimony before the Subcommittee, I fear that I must burden you with a rather lengthy response in order to do justice to those complexities.

The phenomenon of resale price maintenance ("RPM") must be considered both from an economic standpoint and from a legal one. I turn, first, to the economic considerations. It is the view of the Division that the central purpose to be served by the antitrust laws is the preservation of free markets, markets characterized by intense competition, to the end that our national resources may be deployed efficiently so as to yield the largest possible quantity and the richest possible variety of goods and services to our population. In general, this end is best attained by minimizing government interference with business behavior. Business units should be permitted to conduct their affairs in accordance with their own perceptions of their own best interests in rivalry with other businesses in the same industries. Businesses should be permitted, with as few exceptions as possible, to enter and to enforce contracts on terms that are mutually satisfactory to the parties to those contracts.

The antitrust laws do, of course, represent a kind of government interference into that process of free market rivalry and constitute a limited exception to the principle of freedom of contract. But those laws should be interpreted so that they constitute a limited intrusion: private agreements should be struck down and punished only where there is a sound economic basis for supposing that the private agreements will hinder rather than advance the central objective of efficient resource allocation.

It is well established as a matter of economics—indeed it is virtually a matter of unanimous agreement—that certain types of horizontal agreements have those unwanted effects. Agreements between competitors setting minimum prices for the products they sell, agreements between competitors not to compete with one another in specific markets and other analogous agreements which lessen the intensity of competition between rivals are and should remain the central target of the Division's antitrust policy.

In contrast to agreements of those types, agreements between parties who perform sequential steps in the process of producing and distributing goods and services, agreements that are usually characterized as "vertical" rather than "horizontal," are typically conducive to competition and economic efficiency. The negotiation, execution and enforcement of contracts is an indispensable part of the process of competition. Such contracts, for example a contract between a manufacturer and a distributor, obviously circumscribe the freedom of the parties to the contract to do as they wish from moment to moment. Indeed, the very purpose of contracts is to circumscribe the freedom of the parties to them in accordance with the terms of their own agreements. They cannot be regarded as anticompetitive because they perform their intended function. The policy of the Antitrust Division is to interfere with such vertical contractual arrangements only where there is some persuasive basis for supposing that contracts of particular types reduce output, retard innovation, or otherwise interfere with economic efficiency. It is common ground among substantially all economists that vertical agreements, with only rare exceptions, do not have such consequences. The question then is whether resale price maintenance constitutes an exception to that general proposition and, if so, under what circumstances.

To facilitate our discussion, I will assume that only agreements between manufacturers and distributors are at issue, although what I say, in fact, applies to any two sequential participants in a production-distribution chain.

I start with the obvious proposition that if, in a given industry, there were dozens of manufacturers of a particular product and scores of potential distributors of that product, the freedom of any one manufacturer to enter into a resale price maintenance agreement with his subset of distributors could not possibly be harmful or anticompetitive in any way. If Manufacturer A and Distributor A entered into such an arrangement, and if its only consequence was to maintain an artificially high price for the product of Manufacturer A, then that product would soon be driven from the market by the rivalry of lower price products of other manufacturers distributed by other distributors and perhaps by Distributor A as well.

In the context of a competitive market then, if resale price maintenance does no more than achieve artificially high prices at the distribution level, it would never be in the interest of either the manufacturer or the distributor to employ the practice. Their endeavor to do so would be a commercial mistake, only one of the many commercial mistakes that firms in a free market are free to make; and they would suffer the penalties imposed on mistakes by the process of competition. No government interference would be necessary to bring about the disappearance of the practice.

If mere elevation of resale price were the purpose of RPM, a manufacturer could achieve that result by raising his own price to the distributor and capture revenues commensurate with that higher price. Under resale price maintenance, he does not do that: he insists on a high retail price but permits the retailer to keep the revenues that derive from that higher price; and at the same time he accepts the consequence that a smaller quantity of his product will be sold because it is to be sold at a higher price. One cannot suppose that manufacturers, to their own detriment in terms of their sales volume, insist on conduct that can only fatten their distributors' profit margins and lessen their own. Plainly, manufacturers who wish to employ resale price maintenance, and who seek out distributors who are willing to enter contracts in which they promise to comply, have some other end in view.

It should be obvious that when Manufacturer A employs RPM he is attempting to create, on the part of those distributors who agree to comply, an incentive to handle his product at the distributor's level differently from the way in which it would be handled in the absence of such an agreement—in some way which the manufacturer expects will redound to his advantage in his rivalry with other manufacturers. By setting the distributor's price for each unit above his usual costs of distribution, the manufacturer may hope to induce the distributor to incur additional costs: to engage in more intensive local advertising, or to incur the expense of employing more knowledgeable and more highly trained sales personnel who will increase sales volume of the product by explaining more accurately to customers how the product should be used for best results, or to increase consumer satisfaction with the product by providing quicker and more expert post-sale repair and service facilities.

Of course, RPM will not always be effective to induce the distributor to behave in one or another of those ways. Sometimes it will be, and the manufacturer will have achieved his objective. Other times it will fail and it will serve only to elevate retail price; but in these latter cases, the manufacturer's mistake will be punished in the marketplace. Government interference is not needed. The freedom to try something different, to make mistakes and to suffer the failure in the market, is one of the most important aspects of a free market system.

Of course, no particular distributor is required to go along with the manufacturer who wishes to use RPM. A distributor may perceive at the outset, or if not at the outset then still sooner than the manufacturer, that the objective will not be achieved. The distributor is appropriately free to refuse to deal with such a manufacturer. A manufacturer cannot demand that a distributor handle his product in any particular way: he can employ RPM only if there are distributors who are willing to agree to such an arrangement. Conversely, a distributor should not be free, and in our view is not free, to demand that a manufacturer sell his product to the distributor and permit the distributor to resell that product in any way that suits the whim of the distributor from moment to moment. Distribution of a manufacturer's product by a distributor is a consensual matter, a cooperative undertaking, that should proceed on terms concurred in by each of them.

It is our judgment that manufacturers of certain types of products often have legitimate reasons for wishing to control the distribution environment in which those products are resold. If, for example, a product is technologically complex, its success in the marketplace may well depend upon the availability, at the point of sale, of technically trained sales personnel who are able both to instruct the consumer and to assist him in selecting the model, or the combination of components, that will best suit his individual needs.

There is a variety of business procedures through which a manufacturer might exercise that control. He might open his own distribution outlets, staffed with his own employees, whom he would expect to behave as he instructed; but direct distribution is not feasible for most manufacturers. Alternatively, the manufacturer might enter into long and detailed contracts with his distributors, contracts describing exactly how the sales personnel are to be trained and what they are to say to customers; but day-to-day enforcement of such contracts with a large number of distributors would be prohibitively expensive. Or alternatively, the manufacturer might simply attempt to persuade his distributors that such a selling approach promised the best chance of success and profit, both to his distributors and himself, and to encourage them to behave in that way without a contractual commitment on their part.

But a manufacturer with any sense who takes this last course will be aware that the selling practice he desires is more expensive than alternative selling practices, and he will know that the retail price will have to be high enough to cover the costs a distributor incurs in following that practice. A problem will arise if some of his distributors adhere to the expensive distribution mode and others save costs by refusing to do so. The uncooperative, since they will have lower costs, will be able to profit by reducing the retail price below the costs of the cooperative.

But if some distributors are incurring costs by following the agreed sales procedure and are selling at a higher price which cover those costs, while other distributors are not doing so and sell at lower retail prices, then the free rider phenomenon will appear. A substantial number of customers will go to the higher price outlet, will consume the time of sales personnel there to obtain the appropriate counseling, but will then leave without buying, and purchase from a low cost outlet instead. It will prove to be impossible for some retailers to afford expensive point of sale services for which it is not practicable to impose a separate charge if other distributors are not doing so and are selling at prices which reflect the cost savings of not doing so. It the manufacturer is to be successful in controlling the manner in which his product is sold and the quality of point of sale services afforded in conjunction with sale of his product, he must be able to shelter the gross margins of those distributors who are complying with his wishes from the pricing pressure of distributors who are not.

I emphasize that in speaking of a manufacturer protecting his distributors' margins, I am not suggesting that he will enable those distributors to earn more than competitive profits. Protection of their margins is necessary and is afforded because their costs are higher as a consequence of their compliance with their undertaking to market the product as agreed. But it would be inconsistent with the profit-seeking objective of the manufacturer to let his distributors earn profits above the competitive level. Accordingly, he has every incentive to authorize a sufficient number of distributors who will sell the product as agreed so that rivalry between them will eliminate any but competitive profits.

It is true, of course, the RPM is not the only vehicle available to a manufacturer to shelter his distributors' margins to the degree necessary to facilitate provision of point of sale services. He may engage in direct distribution by his own employees, as I previously mentioned. He may create geographic breathing room for his distributors by authorizing each to sell only from a designated location and maintaining adequate spatial separation of those locations, the practice that was upheld the *GTE-Sylvania.*[1] He may create exclusive territorial distributorships, a practice that is economically indistinguishable from the practice involved in *GTE-Sylvania*, or he may use resale price maintenance. One technique will be more successful in some circumstances, another more successful in another; but all the techniques have essentially the same economic consequences. Correct selection of the most cost effective technique will be in the interest of the manufacturer, his distributors and the ultimate consumer. The ability of the manufacturer and the distributor, by consensual agreement, to select the vehicle they expect to work best, including the right to make mistakes in that regard, which they will no doubt on occasions do, is also embraced by the concept of free markets and minimal government interference.

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[1] *Continental TV, Inc.* v. *GTE-Sylvania Inc.*, 433 U.S. 36 (1977).

I do not mean to suggest by what I have said that the various business techniques for controlling distribution are all precise economic equivalents. They are not. The use of territorial restrictions of the several kinds I have mentioned is capable of having anticompetitive effects by facilitating horizontal collusion only under extremely rare circumstances. I will not elaborate on what those circumstances are, since they are not germane to the question you raised or to my answer. RPM can have anticompetitive consequences in a substantially more common set of circumstances. If it were difficult to distinguish those circumstances in which RPM may be harmful from those in which it cannot, one might justify a sweeping prophylactic rule banning it in all circumstances. In fact, however, the circumstances in which RPM may be harmful are relatively easy to identify. Hence, although there is economic justification for antitrust intervention when these circumstances are present, it cannot plausibly be argued that the practice should be attacked whenever it appears.

RPM can have adverse economic effects, at which the antitrust laws might properly be aimed, in two different sets of circumstances. One, which does occur with some frequency, would be presented by a situation in which the market at the manufacturing level was highly concentrated and all or substantially all of the manufacturers employed RPM. Under these circumstances, the set of manufacturers might be employing RPM as a device to facilitate and to police horizontal price fixing among themselves. No one such manufacturer could obtain an advantage by cheating on the cartel arrangement by reducing his price to retailers because his retailers would be unable to sell more of his product unless, in addition to changing his own price to them, he authorized them to change their retail prices. However, to change their authorized resale price would be a highly visible act that would be immediately detected by the other members of the cartel. Accordingly, persuasive economic grounds would exist for challenging RPM in that context.

RPM might also have adverse economic consequences in a second type of situation which is probably more theoretical than real; certainly it would merely be encountered in the United States. If the number of potential distributors was very few and if, in addition, there were substantial difficulties which prevented manufacturers from creating additional distribution outlets, then distributors might employ RPM as a facilitating device for collusion at the distribution level. It would be necessary for the distributors to persuade all, or substantially all, the manufacturers to adopt RPM and to establish price levels in accordance with the distributors' wishes. As I previously suggested, this course would be contrary to the interests of the manufacturers, and they could be expected to resist. Nevertheless, it is conceivable, though most unlikely, that one might encounter a situation of that type. Here, too, an economic basis for antitrust attack would exist. But where neither of these two sets of circumstances exist, no persuasive reason for bringing the antitrust laws to bear on RPM can be identified.

It is true, of course, that RPM eliminates a kind of activity that might naively be described as competition: underselling by free riders will, of course, drive down prices in the short run, but it is economically erroneous to regard all behavior that achieves short run price reductions as being competitive. From that standpoint, the activity of a patent infringer, or a pirate of copyrighted phonograph records, or indeed, sales of stolen goods in a flea market, will achieve short run price reductions. But if one takes a slightly longer point of view, it should be obvious that investments in innovation, or in the recording of phonograph records, or types of property vulnerable to theft, will be significantly reduced if the values which are created by the investment are subject to misappropriation in these ways.

Real competition results in an increase in the quantity of product which reaches the hands of consumers. The parasitic forms of competition discussed above result in a reduction in the quantity of product which reaches consumers. The same must be said of free riders who drive from the marketplace retail services that are well suited to the successful marketing of a complex product: the economic incentives for manufacturers to develop and market such products will be reduced and the quantity of such products that reaches ultimate consumers will be lessened rather than increased. These economic considerations, in combination with the peculiar and somewhat confused legal status of RPM to which I will next turn, underlie the position of this Administration with respect to RPM: namely, that it should be judged under a rule of reason approach that would result in its invalidation whenever it appeared in contexts such that the practice might be conducive to horizontal collaboration but would allow the practice in contexts where it could not plausibly be serving to facilitate collusive behavior.

So far as the legal status of RPM is concerned, it is undeniable that the Supreme Court of the United States has, in a wide variety of contexts over three quarters of a century, struck the practice down. Hence, it is not the position of the Antitrust Division that RPM "is" not illegal per se; it is our position that RPM "should" not be illegal per se in view of the competitive principles outlined above.

The Supreme Court first invalidated RPM in the *Dr. Miles* [2] case in 1911. Justice Hughes began with the historical proposition that "a general restraint upon alienation (of chattels) is ordinarily invalid" at common law, a proposition recognized to have little relevance to antitrust analysis in more recent cases.[3] But Justice Hughes then went on to a more pragmatic analysis: he noted that Dr. Miles had advanced by way of justification only that "confusion and damage have resulted from sales at less than the prices filed." He rejected this defense, saying,

"[T]he advantage of established retail prices primarily concerns the dealers * * *. If there be an advantage to a manufacturer * * *, the question remains whether it is one which he is entitled to secure by agreements * * *. As to this, the complainant can fare no better * * * than could the dealers themselves if they formed a combination * * * to achieve the same result.* * *

"But agreements * * * between dealers * * * are injurious to the public interest and void." (220 U.S. at 407–08.)

Thus, on the first, and one of the few, occasions on which the Supreme Court has attempted to explain why RPM is harmful, it offered an explanation in economic terms that is wrong in the light of sound economic analysis. A price fixing combination at the retail level would generally be damaging to a manufacturer's objective, and its economic consequences would bear no similarity at all to the consequences of RPM in contexts where a manufacturer would choose to negotiate with his retailers to impose it.

Even in the original case, Justice Holmes, in dissent, demonstrated characteristic insight: "I cannot believe that in the long run the public will profit by * * * permitting (retailers) to cut reasonable prices for some ulterior purpose of their own and thus to impair, if not to destroy, the production and sale of articles which * * * the public should be able to get." (220 U.S. at 412.)

The use of the phrase "per se" did not develop until much later, but the court continued to treat RPM as invalid without any examination of the commercial context in which it appeared or any further examination of the economic question why it should be regarded as harmful.

The legal context became far more complicated with the Supreme Court's decision in *United States* v. *Colgate & Co.*[4] which, although it did not permit agreements fixing retail prices, was long interpreted to authorize the manufacturer to recommend prices and cut off retailers who did not comply. Tending in the same permissive direction, the Supreme Court, in the 1926 *General Electric* [5] decision, upheld the right of a manufacturer to designate retailers as his "agents," to deliver goods to them on "consignment" and to effectuate RPM in that way. These two decisions opened paths for manufacturers to achieve their legitimate purposes and thus reduced the level of conflict about RPM to some extent. Indeed, from our standpoint, the decisions were too permissive in that paths were opened in contexts where RPM might serve to facilitate horizontal collusion as well as in contexts where it could not.

The next development, too, was a permissive one: Congress enacted the Miller-Tydings Amendment and, subsequently, the McGuire Act. Thus, RPM was legalized, again in potentially harmful contexts as well in manifestly harmless ones, wherever a manufacturer was willing and able to follow the tortuous procedural requirements state law developed pursuant to the Federal fair trade laws and wherever he could fit his situation within the consignment device sheltered by *General Electric.* Controversy during this period was limited to situations in which neither of these shelters were availed of and in which the complaining party asserted that a pattern of

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[2] *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911).

[3] Compare *GTE-Sylvania* with *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

[4] 250 U.S. 300 (1919).

[5] *United States* v. *General Electric Co.*, 272 U.S. 476 (1926).

"refusal to deal" conduct, attempted in an effort to work within the shelter of the *Colgate* doctrine, had nevertheless resulted in the formation of implied contracts to engage in resale price maintenance. The Supreme Court's decision in *Parke, Davis* [6] is the preeminent example. The decisions during this period devoted much attention to the endless legal refinements that surrounded *Colgate,* the *General Electric* doctrine and the fair trade laws, but none addressed the still unanswered question why RPM, in all its manifestations, should be regarded as unlawful.

The closest the Supreme Court came to offering any explanation responsive to this fundamental underlying question came in *Kiefer-Stewart,*[7] a case which involved maximum prices rather than minimum prices. There the Supreme Court said, "[S]uch agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." (340 U.S. at 213.)

This explanation, of course, does not suffice, for it suggests the invalidity of every commercial contract since each restrains the ability of contracting parties to violate the terms of the contract. More clearly still, it does not even allude to the economic considerations on which antitrust law should be based.

In the mid-60's the Supreme Court began to narrow the restrictions on the practical range of freedom of manufacturers, still without adequate consideration of economic consequences. *In Simpson* v. *Union Oil Co.,8* [8] the Court struck down a "consignment" arrangement that was identical in every detail to the arrangement upheld in *General Electric,* while steadfastly denying that it was departing from the holding in *General Electric.* When, if ever, consignment arrangements may be used by parties in the distribution chain remains to this day shrouded in confusion. The explanation which the Court did give in *Simpson* is inconsistent with the explanation the Court had offered in the leading precedent of *Dr. Miles.* In *Simpson,* the Court suggested that RPM was a device used by manufacturers to coerce and to injure retailers. It said, "We disagree . . . that there is no actionable wrong or damage [to the retailer]. . . . [T]he 'consignment' agreement . . . [is] being used to injure interstate commerce by depriving independent dealers of the exercise of free judgment." (377 U.S. at 16.) Thus a device, first condemned because it was thought to be none of a manufacturer's business and indistinguishable from a cartel among retailers, was characterized in *Simpson* as a manufacturer's device for exploiting retailers. The one description is as much without factual foundation as is the other. Thus, it remains true today that courts have failed to devote sufficient attention to the economic impacts, in different contexts, of RPM.

In our judgment, the Court's careful and thoughtful analysis in *GTE-Sylvania* indicates a willingness to look beyond the verbal similarities between RPM and horizontal price fixing. The treatment is curiously inconsistent with the attitude the Supreme Court has taken toward other vertical arrangements. In *White Motor,*[9] for example, the Court refused to classify vertical territorial arrangements as per se illegal, saying, very wisely, "[W]e do not know enough of the economic and business stuff out of which these arrangements emerge" to justify such a classification. Accordingly, the Court held that summary judgment had been improperly granted.

Similarly, in *GTE-Sylvania,* a case involving location clauses, the Supreme Court overruled the per se rule it had previously laid down in *Schwinn*[10] stating, [t]he rule of reason is "the prevailing standard of analysis." (433 U.S. at 49.) The Court examined in detail the economic consequences of a distribution practice that is closely analogous to RPM, and whose economic consequences are also closely analogous to RPM, and held that the legalities of the practices must be judged under the rule or reason. "[D]eparture from the rule-of-reason standard," the Court said, "must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." (433 U.S. at 58–59.)

If that declaration is taken to mean what it says, then RPM also should be judged under a rule of reason. Nevertheless, the Court did say in a footnote, inconsistently with that declaration, "[W]e are concerned here only with nonprice vertical restrictions. The per se illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy. . . . Furthermore, Congress recently has expressed its approval of a per se analysis . . . by repealing . . . the Miller-Tydings and McGuire Acts."[11]

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[6] *United States* v. *Parke, Davis & Co.,* 362 U.S. 29 (1960).

[7] *Kiefer-Stewart Co.* v. *Joseph B. Seagram & Sons, Inc.,* 340 U.S. 211 (1951).

•ERR14•[8] 377 U.S. 13 (1964).

[9] *White Motor Co.* v. *United States,* 372 U.S. 253 (1963).

[10] *United States* v. *Arnold, Schwinn & Co.,* 388 U.S. 365 (1967).

[11] 433 U.S. at 51, n. 18. The Court repeated these views subsequently in *California Retail Liquor Dealers Ass'n.* v. *Miocal Aluminum, Inc.,* 445 U.S. 97, 102–03 (1980).

There is, however, no necessary incongruity between the action of Congress in repealing the Fair Trade laws and a rule of reason treatment of that practice under the Sherman Act. The Fair Trade laws were far too sweeping a determination of per se legality, and we agree that they ought to have been repealed. In our judgment, the action of Congress in 1976 does not preclude the Supreme Court from reaching a conclusion that, although RPM continues to be per se illegal in those contexts in which it might facilitate horizontal collusion, it should be treated under the rule of reason in other contexts. Although both the House and Senate reports indicate awareness that the Supreme Court had previously declared RPM illegal per se and no doubt expected that they were remitting RPM to that status by repealing the Fair Trade laws, it is also true that there is nothing in the legislative history which indicates a congressional disposition to limit the power of the courts to continue, through interpretation, the evolution and adaptation of the Sherman Act in light of the continuing development of microeconomic analysis.[12]

In our judgment, the most damaging consequences of continuation of a sweeping per se rule against RPM flow not from the fact that manufacturers cannot enter formal price arrangements with their distributors, although that would be damaging enough, but from the implications of such a sweeping rule for other forms of vertical distribution controls. Any time a manufacturer attempts to control the distribution of his goods so that they receive a more costly type of treatment at the point of sale, he must cope with the free rider problem posed by noncooperating retailers who, by refusing to incur those costs, place themselves in a position to undersell. That is true whether the manufacturer uses restricted sales territories, location clauses, exclusive dealing arrangements, or some other approach. All are nominally judged under the rule of reason notwithstanding that all involve the necessary suppression of a destructive form of price cutting which has only very short run advantages but suppresses investment incentives for new, complex products. The Supreme Court fully recognized, in *GTE-Sylvania*, that suppression of this type of intrabrand competition was involved and that such suppression was essential to the attainment of important, long-range goals.

Under the current state of the law, however, it is open to any retailer who refuses to market in accordance with the manufacturer's preferences, and without regard to the intensity of existing interbrand competition, to compel a manufacturer to deal with him on his terms through treble damage litigation in which it is asserted, quite accurately in a sense, that a purpose and an effect of the territorial arrangement selected is to suppress intrabrand price competition. In short, the per se rule against RPM goes far to subvert, in practice, the rule of reason treatment which is, in theory, accorded to all other vertical distribution controls. So long as manufacturers must abide the outcome of trial before juries—juries most often composed largely of persons with no business experience—on the question whether "price fixing" in that sense was a purpose or effect of the selected distribution arrangement, manufacturers will be strongly deterred not just from entering formal price arrangements, but from resorting to a wide variety of distribution controls.

We regard that state of the law as unsatisfactory, and are reviewing the possibility of asking the Supreme Court to change it. We recognize the importance to the general public of the principle of stare decisis and the desirability of promoting certainty in legal rules. However, the Supreme Court itself has emphasized the superior importance of refining legal analysis in the field of vertical restraints. In *Sylvania*, the Court did not hesitate to reverse its own recent decision in *Schwinn* based on improved economic analysis. In view of the Court's action in *Sylvania*, it is not inappropriate to seek reconsideration of a legal doctrine which, we believe, has the unintended effect of injuring American consumers. If, however, the Court is disinclined to modify its traditional approach in this area, or if the Court reads the 1976 legislation as foreclosing its ability to reconsider the issue, we will then consider the appropriateness of seeking legislative change.

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[12] As Robert Bork has observed: "Congress has not legislated per se illegality, either through this repeal [of the Fair Trade Laws] or in the original Sherman Act . . . . The Court, presumably, still has its original obligation to develop the law of the Sherman Act according to its best economic understanding." *Vertical Restraints: Schwinn Overruled*, 1977 Sup. Ct. Rev. 171, 191-92. The Court must, of course, "give shape to the statute's broad mandate" [*National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 688 (1978)], through the exercise of "lawmaking powers" [*Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 101 S. Ct. 2061, 2069 (1981)].

Thank you very much for your continuing interest in our antitrust enforcement policies. I hope this information will help further articulate our position on this matter.

Sincerely yours,

William F. Baxter,
Assistant Attorney General,
Antitrust Division.

U.S. Department of Justice,
Antitrust Division,
Washington, D.C., September 8, 1982.

Hon. Thomas A. Luken,
Chairman, House Subcommittee on Antitrust and Restraint of Trade Activities Affecting Small Business, Committee on Small Business, Washington, D.C.

Dear Mr. Chairman: In response to your August 23, 1982 letter, I have attached the information that you have requested. This information is as complete as can be produced in a relatively short time.

I hope that this information and my own appearance before your Subcommittee on September 9 will help to reassure you and your Subcommittee that the Antitrust Division's current enforcement activities are in the interest of small businesses and the United States economy as a whole.

Sincerely,

William F. Baxter,
Assistant Attorney General,
Antitrust Division.

Attachments.

1. A history of the Department of Justice's funding for each fiscal year from fiscal year 1960 to fiscal year 1982. This should include the amount requested from Congress, the amount appropriated, actual expenditures, and the amount expended by the Antitrust Division.

DEPARTMENT OF JUSTICE APPROPRIATION HISTORY FROM 1960 THROUGH 1982

[In thousands of dollars]

Fiscal year	Congressional request	Appropriated	Actual expenditures
1960	$262,279	$267,085	$257,964
1961	296,594	297,008	284,226
1962	296,670	297,156	294,441
1963	318,288	318,521	317,035
1964	344,562	344,463	327,994
1965	381,853	384,990	358,158
1966	393,990	388,727	372,494
1967	422,877	408,295	408,539
1968	462,232	441,841	430,037
1969	592,952	545,497	514,967
1970	900,386	862,579	639,974
1971	1,266,920	1,250,518	916,382
1972	1,597,121	1,572,287	1,180,343
1973	1,787,718	1,775,710	1,530,722
1974	1,944,920	1,923,951	1,769,525
1975	2,160,135	2,126,851	2,066,907
1976	2,163,242	2,179,077	2,241,575
1977	2,250,633	2,339,544	2,349,727
1978	2,455,693	2,376,662	2,397,374
1979	2,518,417	2,509,738	2,521,717
1980	2,554,916	2,512,745	2,631,678
1981	2,792,292	2,345,864	2,752,441
1982	2,315,981	2,470,295	...

ANTITRUST DIVISION APPROPRIATION HISTORY FROM 1960 THROUGH 1982

[In thousands of dollars]

Fiscal year	Congressional request	Appropriated [1]
1960	$4,500	$4,500
1961	4,760	5,074
1962	5,865	5,875
1963	6,230	6,218
1964	6,599	6,600
1965	7,072	7,072
1966	7,295	7,175
1967	7,595	7,495
1968	7,859	7,820
1969	8,324	8,352
1970	8,930	9,761
1971	10,397	11,079
1972	11,417	12,340
1973	12,242	12,836
1974	14,790	14,790
1975	18,253	18,253
1976	21,595	22,239
1977	23,426	[2] 26,706
1978	29,785	[3] 32,371
1979	[3] 36,377	[3] 37,508
1980	43,288	[4] 45,481
1981	47,255	44,862
1982	49,566	41,200

[1] Actual expenditures are not available.

[2] Plus $1 million for antitrust State grant program.

[3] Plus $10 million for antitrust State grant program.

[4] Plus $4 million for antitrust State grant program.

2. A history of the total number of DOJ employees and the number of employees engaged by the Antitrust Division for each fiscal year from fiscal year 1960 to fiscal year 1982.

DEPARTMENT OF JUSTICE AND ANTITRUST DIVISION EMPLOYMENT HISTORY FROM 1960 THROUGH 1982

Fiscal year	Department of Justice authorized positions	Antitrust Division authorized positions
1960	30,736	516
1961	31,262	535
1962	32,056	602
1963	32,081	612
1964	32,483	608
1965	33,257	613
1966	33,717	614
1967	34,021	614
1968	35,429	614
1969	35,779	614
1970	37,839	595
1971	42,766	610
1972	46,010	630
1973	47,286	629
1974	49,188	629
1975	50,660	712
1976	51,978	856
1977	52,665	907
1978	54,528	920
1979	55,995	977

DEPARTMENT OF JUSTICE AND ANTITRUST DIVISION EMPLOYMENT HISTORY FROM 1960 THROUGH 1982—Continued

Fiscal year	Department of Justice authorized positions	Antitrust Division authorized positions
1980	56,911	939
1981	55,679	939
1982	54,387	829

3. The number of complaints concerning violations of the Robinson-Patman Act, as well as the number concerning vertical trade restraints, received by the Antitrust Division for each fiscal year from fiscal year 1960 to fiscal year 1982.

Because of the vast number of sources of information regarding possible antitrust violations and the widely diverse types of information received, the Division does not maintain official records regarding the total number of complaints received. However, any complaint received regarding a Robinson-Patman Act violation is normally referred to the Federal Trade Commission. The exceptions to this procedure are situations in which the allegation involves predatory pricing that may be cognizable under Section 2 of the Sherman Act or in which the Division has received a complaint alleging a Robinson-Patman Act violation that is associated with another violation the Division would normally pursue. For example, if the Division receives information regarding a possible Robinson-Patman Act violation by a company that may also be involved in criminal price-fixing, the complaint would be referred to the Division's section that would handle the price-fixing investigation rather than the FTC.

4. Of these complaints, the number which resulted in a preliminary investigation for each fiscal year from fiscal year 1960 to fiscal year 1982.

Fiscal year:	*Number of Robinson-Patman preliminary investigations*
1963[1]	5
1964	8
1965	8
1966	9
1967	5
1968	6
1969	3
1970	4
1971	4
1972	4
1973	3
1974	1
1975	0
1976	0
1977	0
1978	0
1979	0
1980	0
1981	0
1982 (through August)	0

[1] Complete and accurate information is unavailable prior to fiscal year 1963.

Note: Although each of these preliminary investigations cannot be associated with a specific complaint, virtually all Robinson-Patman investigations were initiated as a result of a complaint.

5. The total number of investigations undertaken by the Antitrust Division concerning violations of the Robinson-Patman Act, as well as the number concerning vertical trade restraints, during each fiscal year from fiscal year 1960 to fiscal year 1982.

Fiscal year	Robinson-Patman	Vertical trade restraints[1]
1963	6	23
1964	9	30
1965	8	28
1966	10	20
1967	5	18
1968	8	16
1969	4	24
1970	4	22
1971	4	38
1972	4	30
1973	3	27
1974	1	16
1975	0	28
1976	0	33
1977	0	33
1978	0	10
1979	0	19
1980	0	43
1981	0	14
1982	0	6

[1] Includes vertical price-fixing, customer and territorial allocation, restrictive resale practices, boycotts, and refusals to deal.

Note: Since many investigations involve either concerns regarding multiple antitrust violations or issues where the precise violation is unclear, these figures can only be regarded as approximations of the Antitrust Division's actual enforcement activities.

6. The manner and dispositions of investigations concerning violations of the Robinson-Patman Act and vertical trade restraints concluded during each fiscal year from fiscal year 1960 to fiscal year 1982, including the number of investigations closed without action and the number resulting in criminal and civil actions.

Actual data for each fiscal year would not be available without very extreme and costly research. However, there have been no Robinson-Patman Act cases brought by the Division since at least 1963. Since 1976, there have been seven cases brought by the Division challenging vertical trade restraints.

7. The total number of criminal prosecutions and civil suits initiated by the Division, each fiscal year from fiscal year 1960 to fiscal year 1982, concerning vertical trade restraints and violations of the Robinson-Patman Act. In addition, provide the number of charges and suits filed under each applicable section of the Sherman, Clayton and Robinson-Patman Act for each fiscal year.

Since fiscal year 1976 (the earliest date accurate records are available without extensive research), no cases were initiated involving Robinson-Patman Act violations and seven cases have been initiated involving vertical trade restraints:

Fiscal year 1981: *U.S.* v. *Mack Trucks, Inc., et al.* (Civil)
Fiscal year 1980: *U.S.* v. *Cuisinarts, Inc.* (Civil and Criminal)
Fiscal year 1979: *U.S.* v. *Mercedes Benz of America, Inc.* (Civil)
Fiscal year 1979: *U.S.* v. *Under Sea Industries, Incorporated* (Civil)
Fiscal year 1978: *U.S.* v. *B.F. Goodrich Company* (Civil)
Fiscal year 1976: *U.S.* v. *Norman Morris Corporation, et al.* (Civil)
Fiscal year 1976: *U.S.* v. *E.I. du Pont de Nemours & Co., Inc.* (Civil) (Lucite Paint)

See Attachment A.

8. The number and manner of disposition of criminal prosecutions and civil suits resolved each fiscal year from fiscal year 1960 to fiscal year 1982, including the number resulting in a consent decree.

See Attachment A.

NOTE: Complete and accurate information regarding this question is not available for years prior to fiscal year 1970 and complete information has not been tabulated for fiscal year 1982.

9. For each fiscal year since fiscal year 1960, the number of companies named in Robinson-Patman Act and vertical trade restraint complaints. Of these totals, indicate the number of small businesses as determined by Small Business Administration size standards.

While an exact count is unavailable, there have been virtually hundreds of firms named in vertical trade restraint complaints since fiscal year 1960 and very few firms in Robinson-Patman Act violations. No records have been maintained regarding which companies met the criteria used to define small businesses.

10. The number of consent decrees modified during each fiscal year from fiscal year 1960 to fiscal year 1982.

ANTITRUST DECREE MODIFICATION AND TERMINATION ORDERS

Fiscal year	Modification orders entered	Termination orders entered	Total for year
1960	6	2	8
1961	8		8
1962	8		8
1963	9		9
1964	17		17
1965	4		4
1966	6		6
1967	5	1	6
1968	6	2	8
1969	9		9
1970	8		8
1971	4		4
1972	9	1	10
1973	6		6
1974	10		10
1975	12	3	15
1976	9		9
TQ [1]	3		3
1977	11	1	12
1978	6	2	8
1979	4	3	7
1980	10	1	11
1981	6	6	12
1982	4	4	8

[1] Transition quarter.

11. The number of consent orders currently in effect. Of these, the number presently under review or designated for review and possible modification.

There are currently 1,354 decrees in effect, 1,204 of which were originally entered by consent. All of these decrees, whether entered by consent or after trial, have been designated for review. To date, 192 decrees have actually been given at least an initial review. Of these 192, 121 decrees have been identified as likely candidates for modification or termination and have been sent to the Division's sections for more thorough review and analysis. Another 31 have been identified as likely candidates for modification or termination, but have not yet been reviewed. Another 12 decrees have been set aside for reconsideration at a later date and 28 decrees have been designated for no further action.

ANTITRUST DIVISION WORKLOAD STATISTICS, FISCAL YEARS 1970-81

District court antitrust cases	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981
Total civil cases:												
Filed	54	52	72	42	33	37	45	34	27	31	28	25
Terminated	49	44	44	50	48	24	40	36	48	32	37	36
Won	43	42	41	44	42	13	31	27	39	28	30	32
Lost	4	1	1	5	3	5	5	4	3		4	1
Dismissed	2	1	2	1	3	6	4	5	6	4	3	3
Pending	88	96	124	116	101	114	119	108	87	86	77	66
(1) Restraint of trade—civil:												
Filed	15	14	31	19	10	29	18	19	20	14	15	17
Terminated	17	16	16	21	26	9	14	13	22	26	25	18
Won	16	16	16	21	24	7	11	10	20	24	23	17
Lost	1				1	1	1				1	
Dismissed					1	1	2	3	2	2	1	1
(2) Oligopoly and monopoly—civil:												
Filed	11	15	13	5	6	3	5	2		2	2	1
Terminated	8	11	9	7	2	7	7	3	1	2	2	3
Won	8	11	9	7	2	2	4	2	1	2	2	3
Lost						2	1	1				
Dismissed						3	2					
(3) Merger cases:												
Filed	15	24	19	16	13	3	7	4	7	11	10	4
Terminated	22	11	20	18	14	7	15	13	14	1	7	12
Won	18	10	18	13	10	4	9	9	10		5	9
Lost	3	1		4	2	3	4	3	3		2	1
Dismissed	1		2	1	2		2	1	1	1		2
(4) Damage actions—civil:												
Filed	4	1	1		2	6	1	1	3	4	1	
Terminated			1	1			1	2	2	3		
Won			1	1			1	1	1	2		
Lost												
Dismissed								1	1	1		
Pending												
(5) Other civil:												
Filed	14	4	11	5	6	2	15	3	1	5	2	1
Terminated	9	8	1	6	8	2	9	7	11	5	3	3

ANTITRUST DIVISION WORKLOAD STATISTICS, FISCAL YEARS 1970–81—Continued

District court antitrust cases	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981
Won	8	7	1	5	8		9	6	8	4	1	3
Lost				1							1	
Dismissed	1	1				2		1	3	1	1	
Total criminal cases:												
Filed	5	12	15	20	34	35	20	37	31	27	55	71
Terminated	11	10	12	21	18	19	35	29	34	33	53	67
Won	10	9	12	17	15	16	33	19	29	33	50	64
Lost		1		3	3	3	2	8	4		2	3
Dismissed	1			1				2	1		1	
Pending	14	16	19	18	34	50	35	38	35	29	31	35
(1) Restraint of trade—criminal:												
Filed	4	9	14	19	21	29	16	34	27	24	54	69
Terminated	10	8	12	18	17	12	31	23	28	28	51	67
Won	9	7	12	16	14	12	30	16	26	28	47	64
Lost		1		2	13		1	6	2		3	3
Dismissed	1							1			1	
(2) Oligopoly and monopoly—criminal:												
Filed		2	1	1	3	1	2	1				1
Terminated			1	2	2	3	1	3		1		
Won			1	1		3	1	1		1		
Lost				1	2			1				
Dismissed								1				
(3) Criminal cases charging other Federal crimes (perjury, obstruction of justice, mail fraud, false statements, etc.):												
Filed	17	5	11	5	15	10	19	5	7	4		
Terminated	1	2		1	1	6	4	4	6	7	3	
Won	1	2			1	3	3	2	3	7	3	
Lost	1					3	1	2	2			
Dismissed				1					1			
Case results:												
Individuals indicted	14	34	24	42	84	82	101	88	103	62	72	83
Total amount individual fines (thousands of dollars)	243	40	203	221	175	645	578	743	1,231	2,098	667	660
Number of individuals	37	18	24	46	32	44	72	87	72	76	27	33
Number of individuals sentenced (actual jail)	3	7	1	8	5	8	6	26	29	19	15	49
Number of individuals sentenced (including probation)	11	7	14	13	26	30	34	58	71	58	47	59

Total number of actual jail days (sentence-served)	111	270	180	450	50	690	560	1,561	2,921	2,360	1,381	7,041
Corporations indicted	16	56	51	69	121	127	110	147	147	102	87	74
Total corporation fines (thousands of dollars)	1,512	268	977	1,208	1,263	2,200	3,135	2,597	11,214	23,338	8,601	16,178
Number of corporations	64	29	45	84	64	73	119	89	136	135	64	77
Total corporation damages (thousands of dollars)	175	540	115	225		607	770			6,871	4,118	2,830
Number of corporations	5	11	1	4		5	8			35	3	10
Total corporation contempt:												
Fines (thousands of dollars)	38			5	600	75						
Number of corporations	3			1	2	2						
Cases won without completing litigation:												
Consent	36	39	31	35	34	10	28	22	34	27	27	32
Conviction by pleas	10	6	12	16	15	14	29	17	27	28	45	57
Dismissed							2	1	2		3	3

Mr. **LUKEN**. All right. I will ask Mr. Daub first, then Mr. Dorgan, and then I will conclude the questioning.

Mr. **DAUB**. I just really want to know if you said all those things that the Washington Post says you said.

Mr. **BAXTER**. I did not talk with anyone on the Washington Post. I assume they went back through—I have no idea what—testimony before congressional committees, perhaps notes that students had taken in my classes over the years. I would not be prepared to say that I never anywhere on the face of the Earth or at any time said any one of the particular phrases. On the other hand, I certainly didn't recognize the member of the media.

Mr. **DAUB**. A couple of the witnesses quoted, and I just can't get my hands on the text of each of theirs, but they said there were five or six phrases of reference. One was peddlers. Can you put your finger on that? There was a series of five. Some may have thought they were approbative epithets if they assumed they have reference to their industry or trade, but I just hadn't quite focused on it. I will find it in a minute.

Do you think that the enforcement of Robinson-Patman ought to be for every technical violation that comes to your attention?

Mr. **BAXTER**. I most certainly do not think so. In the first place, there is an allocation understanding between the Justice Department and the Federal Trade Commission of many years standing that the Federal Trade Commission will be the enforcer of the Robinson-Patman Act.

The only exception to that understanding over the years has been instances in which the same basic fact situation involved, let us say, a criminal price-fixing conspiracy which could only be handled by the Department of Justice and also a Robinson-Patman case. Under those circumstances, the Antitrust Division would take the Robinson-Patman problem along with the criminal price-fixing problem since, as a practical matter, you didn't want to have two cases going involving the same factual episode and, indeed, could not. So, the Robinson-Patman Act has not been an area of active enforcement by the Antitrust Division, running back at least 20 years that I am aware of.

But quite apart from that, in a our present context of budgetary stringency, there is no area of antitrust where it is reasonably to be expected or indeed, in my view, responsible for an enforcement agency to try to bring every single case that comes across the horizon. There is no area of antitrust, as I said this morning, to which I am more devoted to savage enforcement than classical cartel behavior, such as horizontal price fixing, and market division. Yet even there, one runs across cases where small segments of the economy, unsophisticated people, or difficulty in identifying an appropriate remedy, lead one to the conclusion that bringing this particular case doesn't make any sense, and wouldn't be a good devotion of departmental resources. Thus, one does not bring it.

Mr. **DAUB**. Would you agree with the statement that was made, or the crux of a statement that was made, by Dr. Thomas Campbell, who, as you know, is the Director of the Bureau of Competition for the Federal Trade Commission, when he said that in his prerogative as a prosecutorial discretion sort of thing would be not to recommend prosecution that would do more harm to small business than good?

Mr. **Baxter**. I am not sure that I would really agree with that formulation. I would prefer, myself, to think of antitrust law as bearing entirely—or at least the acid test as to how it bears on consumers. If I found a number of small businesses that were engaged in price fixing among themselves, I would most certainly bring a price-fixing case. Yet, I suppose I would have to say in that case that, in some sense or other, I would be doing harm to those small businesses. I just don't find that an appropriate frame of reference.

Mr. **Daub**. I appreciate your point of view.

My earlier comment had reference to Endicott Peabody of the National Mass Retailing Institute, a prior witness who in his testimony quotes you as saying, "We are alternately referred to by Mr. Baxter as 'pirates, free riders, patent infringers, and flea market peddlers."

Mr. **Baxter**. I know where that came from. I wrote a 15-page letter to some gentlemen in the mass merchandising industry in which I attempted at some length to spell out my view of resale price maintenance, when it was economically harmful and when it was economically useful and desirable. In the course of doing so, I pointed out that there are some products in an economy that are complex and which the consumer, to use them optimally so as to be of the greatest possible value to the consumer, will need some assistance in their selection. For example, perhaps service on the product either at the time of sale or at some some subsequent point in time when it breaks down and that it would be very important to the manufacturer if his product has those characteristics that such services are made available to consumers. If the services can't be charged for separately, as is often the case—it simply is impracticable to charge for the service separately by to billing the time of the sales clerk, whether or not people buy anything or something of the sort——

Mr. **Daub**. Yes.

Mr. **Baxter**. Then, of course, since it is expensive to render services of that kind, a seller who manages to get hold of the product and to sell it without rendering those services, and he will always be able to sell it for a lower price. But, nevertheless, those who are providing the service as the manufacturer wishes will not effectively be able to compete if others they are able to charge that lower price.

Mr. **Daub**. I have just two quick yes or no types, if you would be as brief as you can. My time is just about up.

Dr. Campbell had said there well could be instances where resale price maintenance would be beneficial to competition, and he gave an example. I don't know if you had a briefing on it or not, but he gave the example of a brandnew company, a small company in many cases, just trying to get their foot in the door, not 5 or 10 percent of the market, but just that first 1 percent. So, those people handling this given product line say, "You got to give me a price." So it ends up being a price maintenance agreement that helps them establish a market. To get customer acceptance they got to have a seller's acceptance first. Do you agree with that, that it might be beneficial on occasion?

Mr. Baxter. I think there are a number of contexts in which it can be very beneficial, and that is one.

Mr. Daub. Let me ask you this: In the *Schwinn* case and its follow-on in *GTE,* do you see that in harmony with your current administration's policy?

Mr. Baxter. I see the *GTE* case as being very much in harmony with the current administration's policy. I think the *Schwinn* case was quite rightly overruled.

Mr. Daub. Good. Thank you.

Mr. Baxter. I would like, if I could, to continue for just one more minute on your question about the context in which I used those other phrases.

Mr. Daub. Sure.

Mr. Baxter. The context is that if retailers who are willing to provide these services are driven out of the market, then, of course, the manufacturer's purpose will totally have failed. In that context, what I said was that not every practice which reduces prices is necessarily socially desirable. I also gave as instances of practices that reduced prices, but were not socially desirable, patent infringers, sales of stolen merchandise at flea markets, and so on, and so forth. It is a terrible distortion to suggest that I referred to the people in that industry as having those characteristics. I thought the record should be clear.

Mr. Daub. Thank you.

Mr. Luken. I have just one question. Would you disagree with the court's dicta on price maintenance in the *GTE* case?

Mr. Baxter. The *GTE* opinion said only that it did not deal with the question of vertical price restraints, but only with the question of nonprice restraints. In other words, in *GTE-Sylvania,* the propriety of price restraints was simply reserved or set aside.

Now, Justice White, in his dissenting opinion in *GTE*, argued at some length that the philosophy and the reasoning of the majority opinion undermined, and was inconsistent with, what the Court had previously said about resale price maintenance, and he was quite right. It was inconsistent. But the majority did not fully respond to that point. It simply said we do not deal here with that question and put it to one side.

Mr. Luken. The court said it would not extend that decision to the price restraints, didn't it?

Mr. Baxter. It didn't predict what it would do in the future. I am reluctant to pretend that I remember the exact words, but I think they said, "We do not deal here with the question of . . ."

Mr. Luken. But we both know the dicta doesn't predict what they will do in the future.

Mr. Baxter. Right.

Mr. Luken. But I think the inference has generally been drawn from that case that the court would not approve price maintenance.

Mr. Baxter. I suspect there were as many inferences as there were readers.

Mr. Luken. Have you commented on that case?

Mr. Baxter. Yes, indeed.

Mr. Luken. Critically?

Mr. Baxter. On *GTE-Sylvania*? To the contrary, I admire it.

Mr. **Luken**. You have never commented critically on *GTE-Sylvania*?

Mr. **Baxter**. Not in any context I can recall.

Mr. **Luken**. Mr. Dorgan.

Mr. **Dorgan**. Thank you, Mr. Chairman.

First, let me with Mr. Daub clear up something. I wasn't suggesting that you weren't aware of what the conditions were in the discussion you were having with the witness. I am not either blessed with or hampered by a law degree. The problem is I did teach economics for a while, and that may well be a greater restriction than a law degree. That remains to be seen, I guess.

The issue of antitrust enforcement, the issue of resale price agreements, those kinds of things, are very complex issues. I think sometimes it is necessary to take a look at these issues through glasses that are not colored by legalistics, but colored by commonsense in what is good for the country and what was meant by the statutes, in not a technical term but a substantive term. I worry that sometimes that is happening.

In your testimony, Mr. Baxter, you stated that when we receive a complaint about a resale price maintenance, we conduct an inquiry to determine whether the particular practice is truly anticompetitive, that is, whether it facilitates horizontal collusion. Whether it is anticompetitive or not, it is against the law; is it not?

Mr. **Baxter**. Yes; the Supreme Court has repeatedly said that these practices are illegal *per se.* It never explained why it thought they should be, but it has repeatedly said that they were.

Mr. **Dorgan**. Therefore, if someone registers proper complaint and they are telling you that a retail price maintenance agreement exists that is against the law, I guess I don't understand why you are concerned about inquiring to determine whether it is truly anticompetitive, the emphasis on the word "truly." If your inquiry determines that, in your judgment, it is not, then you would fail to do anything about that complaint?

Mr. **Baxter**. Very likely, yes. I hate to think of the size that the Antitrust Division would have to be in order to bring every conceivable case that came across the horizon.

Mr. **Dorgan**. Perhaps the best test of Government would be to have a very large Antitrust Division in this country, as opposed to some other departments that we have, with a large contingent of lawyers or analysts working in it so the marketplace is truly a free marketplace. I am not so concerned about devoting resources to antitrust activity.

One of the reasons I came over—I am on the full committee, not on this subcommittee—is because I've been concerned over the statements I have read in the newspapers and publications that you have made. I grew up reading about the things that the late Phillip Hart was doing on antitrust issues. I think he did some incredibly good things in his term in the U.S. Senate. He did them by himself, virtually. He plodded and plodded along on these issues and kept at them tenaciously because he cared about competition, he cared about what concentration was doing to choke off competition in the economy, and he had the kind of long-term perspective, I think, of what the future of this country would be unless we cared about really enforcing our antitrust laws.

I see very little of the work that Phil Hart did being continued here in Congress. Then I read the sort of statements that I hear coming from you, and I am very concerned. I am not presuming that all the statements are accurate. Let me, if I might, read a couple back to you. The first one is dealing with conglomerates or verticals. You were quoted as saying, "There is nothing written in the sky that says that the world will not be a perfectly satisfactory place if there were only 100 companies, provided each one had only 1 percent of every product and service market."

Is that really how you feel? Is that an accurate quote, first of all? If it is, do you really believe that?

Mr. BAXTER. Yes, it is an accurate quote. Yes, I think that from every economic perspective, that would result in an intensively competitive and very satisfactory set of commercial arrangements.

Mr. DORGAN. Do you think if the goods and services that were produced and distributed in this country were done so by 100 corporations, each having 1 percent of the market, we would have a perfectly competitive system, one in which you, as the head of the Antitrust Division in Justice Department, would not have any difficulties with?

Mr. BAXTER. I wouldn't call it a perfectly competitive system, because if you taught economics somewhere or at some point or other, presumably you know that that phrase is usually reserved for a model that embodies a number of theoretical characteristics like perfect information, and so on, and so forth, that do not actually exist. But I would certainly regard it as yielding an effectively competitive economy.

Mr. DORGAN. I have got to tell you, and I don't mean this personally, but I am so frightened by having someone with that philosophy as the head of our antitrust activities in the U.S. Justice Department, I can't even describe it to you. That philosophy is so foreign to the kinds of things I believe about this country's economy, about the need for competition in this country, that I can't even begin to describe the chasm that exists.

Let me ask you just a theoretical question. When last year we were short of credit in this country, small business was having difficulty, and so on, Paul Volcker was over there choking the throttle on credit, and Mobil decided they wanted to buy Conoco. What were your thoughts over there in the Justice Department looking at that proposed merger using $5 billion of borrowed money? Did you have any thoughts about what that would mean to the American economy?

Mr. BAXTER. A very extensive set of thoughts, yes, indeed.

Mr. DORGAN. Could you describe them to us?

Mr. BAXTER. The problem was to identify the markets in which both of those companies presently engaged in competition, or were potential competitors, to examine each of those economic sectors for levels of concentration and form a judgment as to whether the merger would, in that particular line of commerce, in some portion of the country give rise to the distinct possibilities of collusion and, therefore, to a substantial lessening of competition as that phrase is used in section 7 of the Clayton Act.

Mr. DORGAN. If competition is something that is very important and something that you are supposed to help foster, and if competition includes the ability of small to medium-sized business firms in this country to obtain enough credit to exist—and almost all businesses exist on credit—and if this proposed merger uses $5 billion worth of credit, then, as the head of the Antitrust Division of the Justice Department, are you able to determine in any manner that perhaps horizontal mergers or conglomerate mergers that use tremendous amounts of credit and drain it away from the productive segments of our society that would build a plant or employ a person, and so on, that perhaps that ought to be looked at with a critical eye and maybe you ought to be doing something about it?

Mr. **Baxter**. I think the question really embodies a misunderstanding as to what is in short supply. A merger does not use up credit in any ordinary or important sense of the term "credit." On the day before merger, there is one set of people who hold a relatively illiquid asset, called a share certificate, and another set of people who hold a relatively liquid set of assets, called demand deposits or something else. On the day after the merger, the share certificates are in the second set of hands, and the demand deposits are in the first set of hands, and there is available every bit as much investment capital, credit, money, or whatever phrase you wish to use, as there was the day before.

Mr. **Dorgan**. So we could make that case going right up to one corporation in this country; couldn't we?

Mr. **Baxter**. If you are going to try to base it on creating a shortage of credit, yes, indeed, you could. That wouldn't necessarily make it a desirable arrangement, needless to say.

Mr. **Dorgan**. Let's take your philosophy just to its ultimate step. What if we had not 100 corporations, but 2 corporations, each having 50 percent of a perfect market. Would you suggest that if those two corporations exhibited all the behavior of competitiveness we would expect of a business that that would be good for America?

Mr. **Baxter**. What we know about the performance of markets is that when concentration reaches those levels, the quality of performance in the market is very likely to deteriorate. It is difficult, at best, to make direct observations or confident predictions about the performance characteristics themselves. So, historically, and quite rightly I think, we have used concentration as a proxy and a predictor for the quality of performance. Obviously—I shouldn't say obviously—the fact is that I would find concentration objectionable quite some time before it reached the levels you are now suggesting.

Mr. **Dorgan**. Mr. Chairman, if you will indulge me for just two more quick questions.

I appreciate your response, and I am not trying to badger you. It is just that I find an area of philosophical difference so wide I can hardly try to bridge it.

Mr. **Baxter**. I have the same sensation.

Mr. **Dorgan**. I would guess, more than once.

If next year the dollar amount of mergers in this country is not $80 billion, but, let's say, $280 billion, will you be concerned about that? If what you are suggesting is just the transfer of paper, and the people who wear eyeshades will give one person a piece of paper and somebody else will get a bit of money and somebody else a little credit, will you be concerned about the size of the merger activity next year if it is $280 billion in this economy?

Mr. BAXTER. I don't know. I would be very concerned about why the level of merger activity had changed so enormously. It has been high, but by no means unprecedented, during the last year or two. Indeed, if one converts into standard units of account—that is to say, if one uses 1970 dollars or 1978 dollars or any other single dollar year—the level of merger activity during 1980, 1981, or early 1982 has been lower than the level of merger activity of, let us say, 1968. So you are talking about a jump in merger activity of a half an order of magnitude, and that would be an astounding phenomenon. One would have to ask very seriously why such an enormous change had come about, and certainly I would so ask.

Now, whether I was concerned or not would depend very largely on the answer I got to the question when I asked it.

Mr. DORGAN. Thank you.

The term "efficiency," I don't believe, shows up anywhere in the Clayton Act or any of the legislation that deals with antitrust enforcement. Yet you, I think, talk about efficiency occasionally in the statements that I have seen with respect to conglomerate mergers. Is efficiency a value that you think is important when you are using a yardstick of measurement to determine whether or not a conglomerate merger, a vertical measure, is in the interest of the American economy as defined by legislation that is on the books?

Mr. BAXTER. Yes, indeed, I do.

Mr. DORGAN. Can you explain why?

Mr. BAXTER. Yes, I will try to do that. The legislation that is on the books uses two phrases. Throughout the Clayton Act, the phrase that appears is "may substantially lessen competition." Under the Sherman Act, the phrase that appears is "unreasonably restrains trade." It is quite clear from the legislative history of the Sherman Act that restraints on output were what the Congress had in mind, and to restrain trade was to restrain output.

Mr. DORGAN. Pardon me. Could you say that again?

Mr. BAXTER. I said to restrain trade was to restrain output.

Mr. DORGAN. OK; go ahead.

Mr. BAXTER. All of that exhibits a fair amount of economic sophistication on the part of the Congress that wrote that legislation.

Now, the use of the term "efficiency" is a lapse, I suppose, back into my own teaching of economics. I use it less in the way that the ordinary person might use it, I suppose, in everyday conversation than as a reference to what economists call technical efficiency, output on the output frontier, marginal cost equal to marginal revenue, general equilibrium conditions being satisfied, and so on, and so forth.

So it is a quick way in which I habitually refer to the ultimate objective of the competitive process. But I don't regard that as being of any importance. I would be quite as happy to refer to competition because I regard competition as a process that we prefer precisely because it does lead to the efficient use of the resources that are available to us, the largest possible output of goods and services for consumers that can possibly be extracted from any particular combination of resources that are available to the community at any moment in time, and that is the objective of this particular area of the law.

Mr. **Dorgan**. Mr. Baxter, I appreciate your patience in my questioning. I have to tell you that it is my judgment, and mine only, that your view is the narrowest possible view in trying to determine what is good for this country's free and competitive economy in the future. We disagree, and I hope that we can do that respectfully. I submit to you that that is the way I feel. I want to impress upon you that my disagreement is profound on this matter with you.

I think that we need someone in the Antitrust Division who has a perspective about aggressively pursuing the kinds of conclusions that give us a strong and free and continually competitive economy, and I don't see that coming from your kind of philosophy.

I appreciate your being patient with me, and I appreciate your response to questions.

Mr. **Daub**. Mr. Chairman, I want to correct the record for my good friend here very quickly. I would indicate I had a second profession besides being a lawyer. I was manager of a $25 million business for 10 years before I came to Congress. You were a tax commissioner before you came, weren't you?

Mr. **Dorgan**. Yes. I have owned a small business and also worked for a large corporation. That reflects my interest in the nature of competition and in the nature of the size of enterprises and how it relates to the——

Mr. **Daub**. I was trying to encourage the humorous response from you that we both had a problem.

Mr. **Dorgan**. I think, having been a tax collector, there is very little humor left in these bones.

Mr. **Luken**. Mr. Bedell, do you have any confessions to make?

Mr. **Bedell**. Yes, I do, as you might expect, Mr. Chairman.

Mr. Baxter, you indicated that if there were $200 billion expended in merger activity next year, you would not necessarily be concerned, that you might be, but not necessarily. Is there any point at which you would be necessarily concerned, or would there be no limit to that? Is there no time at which the size of that would be sufficient to cause you to be concerned?

Mr. **Baxter**. I am sure the answer must be yes, but I couldn't say in the abstract exactly what it would be.

Mr. **Bedell**. You think there might be someplace, but it is certainly not at $280 billion?

Mr. **Baxter**. No, it might well be at $280 billion. I find that question rather like asking whether there is some level of trading on the New York Stock Exchange that I would find terribly troublesome. I can remember when a 7-million-share day was a very big day indeed, and now we have traded 130 million shares daily several times within the last month. There is nothing inherently unsettling about those big numbers, but if they were to change suddenly and very substantially, one would want to be sure he understood what was going on.

Mr. **Bedell**. Just so we have the record straight, you did testify, if I understood you correctly, that you would not necessarily be concerned over $280 billion expended in merger activity next year, it would depend upon how it was expended and what the conditions were.

Mr. **Baxter**. Yes, that is correct.

Mr. **Bedell**. Apparently, to go beyond that, you don't feel comfortable saying that you would not necessarily be concerned about $280 billion, but you don't know how high that would have to be before you would start to be concerned. That is what I am understanding you to say.

Mr. **Baxter**. What I am saying is the dollar level of the activity would not be what concerned me.

Mr. **Bedell**. I understand that quite clearly. We understand that very clearly. My question to you is, then, does that mean that the dollar level of the activity would not concern you, no matter how high it might get?

Mr. **Baxter**. The dollar level would not. One can imagine the circumstance where a single company was sold 365 times, once on each successive day of the year, and the economy looked unchanged at the end of the year while the dollar level of merger activity over the course of the year was enormous.

Mr. **Bedell**. So, the size of the dollar activity would not concern you necessarily, right?

Mr. **Baxter**. Not necessarily.

Mr. **Bedell**. OK.

You said that if there would only be 100 corporations in the United States, that would not particularly disturb you, and you thought that 2 would. Where in between there would you roughly draw the line as to where you think it would start to get where it would concern you?

Mr. **Baxter**. Even 100 companies, as a practical matter, would concern me because it is very difficult to imagine many of our important commercial activities being conducted efficiently by very, very large companies. It is perfectly obvious that there is a wide variety of economic activity that is more efficiently performed by quite small companies. I never suggested that it would be a good idea to have nothing but large companies.

What I was suggesting was that there was nothing inconsistent in the existence of very large companies and in intensely competitive markets. If companies have relatively small market shares, as they often do, notwithstanding the fact they are very large, there is no particular reason to think that the markets in which they are engaged will not be intensely competitive.

Mr. **Bedell**. That is great. I think we are straightening something out, because you were quoted as saying that you would see nothing—I don't have the quote right before me—but you see nothing wrong with only having 100 corporations in the United States. I understood you to say that was an accurate quote and you did indeed believe it.

Apparently you do feel that is not necessarily your feeling, that you would be somewhat concerned because of the fact that some things would not necessarily be most effectively done by just 100 corporations.

Mr. **Baxter**. That is right.

Mr. **Bedell** [presiding]. It is important to have the record straight, Mr. Baxter, as to what you feel. Do you feel that probably that statement was in error?

Mr. **Baxter**. No, I don't feel the statement was in error at all.

Mr. **Bedell**. The statement says, "There is nothing written in the sky that says the world would not be a perfectly satisfactory place if there were only 100 companies, provided each one had 1 percent of every product and service market," and so on.[1]

Mr. **Baxter**. That is right.

Mr. **Bedell**. I understood you just now to say that you thought that would be a problem because some of these things could be more effectively done by small businesses than large businesses. If that is the case, then I presume you would not think that it would be good to just have 100.

Mr. **Baxter**. I didn't say I thought it would be good. I was talking about the intensity.

Mr. **Bedell**. You said it is perfectly satisfactory.

Mr. **Baxter**. I said there is nothing written in the sky, there is nothing inevitable about the fact that all economic activity might not be performed in a very satisfactory way by 100 companies. That is contrary to present technological facts, but the point of the statement was that markets could function in a perfectly competitive way without regard to the size of the companies, so long as market shares were not too large.

Mr. **Bedell**. That may be, but let me read what it says, "* * * the world would not be a perfectly satisfactory place if there were only 100 companies." That goes beyond just competition. That says the place would be perfectly satisfactory. I am not trying to pin you down. You have got a chance here, Mr. Baxter, to either say that that is what you really feel or you don't feel. Do you feel that the world would be a perfectly satisfactory place if there were only 100 corporations?

Mr. **Baxter**. Not in the present state of technology.

Mr. **Bedell**. So you do not think it would be a satisfactory place?

Mr. **Baxter**. Not in the present state of technology. But there is nothing written in the sky that says that our markets could not function in perfectly competitive ways with only 100 companies.

Mr. **Bedell**. I think that is very important. I think the important thing to get is, "There is nothing written in the sky that says that the world would not be a perfectly satisfactory place if there were only 100 companies." I don't mean to talk about written in the sky, and so on, but that certainly has been interpreted to mean that you believe that this would be a perfectly satisfactory place here in the United States if we only had 100 corporations conducting our business activity. Apparently the truth of the matter is you don't really believe that at this time.

Mr. **Baxter**. Not as a matter of technology, no.

Mr. **Bedell**. OK.

How do you perceive your job, Mr. Baxter? What do you perceive your duty to be?

Mr. **Baxter**. To maintain an effectively competitive economy through the enforcement of the antitrust laws.

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[1] Source: *Dun's Review*, August 1980, p. 38.

Mr. **Bedell**. You believe your job is to enforce the laws that we enact here in the Congress, do you?

Mr. **Baxter**. Yes.

Mr. **Bedell**. But, yet, you indicated in your written testimony and under questioning by Mr. Dorgan that when you receive a complaint about resale price maintenance, you conduct an inquiry to determine whether a particular practice is truly anticompetitive, that is whether it facilitates horizontal collusion. You agreed, I thought, with Dorgan that the law says that it is illegal to do it regardless of whether that is the case or not. Do you agree that the law says it is illegal to do it regardless of whether it facilitates horizontal collusion?

Mr. **Baxter**. Yes, I do.

Mr. **Bedell**. Do you believe it is your duty to enforce the laws that are enacted by the Congress?

Mr. **Baxter**. I certainly do, in general. But if you ask the question whether I believe it is my duty to bring every conceivable antitrust case against every technical violation that comes to our attention, my answer is a very different one.

Mr. **Bedell**. So you believe that it is up to you to decide which ones violate the law enough that you should prosecute them and which ones don't violate the law so much, so you should only prosecute those that you think violate the law; is that correct?

Mr. **Baxter**. Essentially that is correct. I wouldn't have phrased it that way. I try to decide whether the practice is one that is likely to damage consumers. I try to decide whether private enforcement in the area involved is effective and needs supplementation by Government enforcement. There are many areas of antitrust where private enforcement probably is more efficient and more cost-effective than Government enforcement.

Mr. **Bedell**. What would you do if you were a Congressman sitting in the Congress charged with the obligation of trying to determine what were to be the laws of the land to be enforced by your Department, and then you had somebody from that Department come before you and say, "It doesn't really matter what you folks pass in regard to laws. We are going to look at those laws and we are going to sort them out, and we are going to decide of the people that violate them which ones we think we should prosecute and which ones we think we should not prosecute." Not only that, but you announce to all of our society that, "We are not going to prosecute those laws that fall under these particular categories, even though the Congress has stated that they are to be enforced."

What would you do if you were sitting in the Congress and had somebody such as yourself come to testify before you that said, "We are going to look at the law you passed, and we are going to prosecute those people who violated the law these specific circumstances, but we are going to tell everybody else that they can violate that law as long as they don't do these sorts of things and we are not going to prosecute them." What would you do if you were sitting in the Congress?

Mr. **Baxter**. In the first place, the Congress has never said anything that vaguely resembled that. The Congress has never passed any statute that says that every single technical violation, however insignificant in its consequences——

Mr. **Bedell**. The Congress passed a law that said there was not supposed to be manufacturer pricing at the retail level.

Mr. **Baxter**. I find that written nowhere in the statutes.

Mr. **Bedell**. You find it written in the statute, and the Supreme Court reaffirmed it twice, do you not?

Mr. **Baxter**. I find it nowhere written in the statutes. Where do you find it in the statutes?

Mr. **Bedell**. I don't understand, because it is my understanding that the Congress, first of all, passed a law that did exempt resale price maintenance, but then we removed that exemption, and the Supreme Court had twice ruled that indeed it was illegal for that to happen. I will quote you. This is what you were quoted as saying, and maybe you didn't say it,

> The Supreme Court has said on a variety of occasions that vertical price fixing is per se illegal. It is the position of the Antitrust Division that this practice should not be illegal per se in view of certain competitive principles.

Is that what you said?

Mr. **Baxter**. It sounds like a perfectly accurate quotation, but there is nothing in the statutes that says vertical price maintenance is unlawful.

Mr. **Bedell**. The Supreme Court has ruled there is.

Mr. **Baxter**. Indeed the Supreme Court has.

Mr. **Bedell**. The Supreme Court has ruled that the statutes say that it is illegal. How can you come here and say that the statutes don't say it is illegal when you even say here that the Supreme Court has said that it is illegal?

Mr. **Baxter**. The statutes do not say it is illegal. The statutes have been interpreted by the Supreme Court as making it illegal. That is quite right.

Mr. **Bedell**. OK. Let's start from there. If you passed a law that the Supreme Court agreed made a certain practice illegal, they said that it is illegal per se, and you were sitting in the Congress and you agreed that was what was meant to be done and that was what the Supreme Court had said had been done, and then the Enforcement Division comes before you and says, "We agree that the Supreme Court has said that it is illegal, but we are only going to prosecute this illegality in these certain circumstances and the other people can go ahead and violate that law as long as they violate it in this manner," how would you feel if you were somebody in the Congress faced with that problem?

Mr. **Baxter**. I would feel, in this particular instance, that there was an enormous amount of private enforcement out there and that, given the budgets of the enforcement authorities, they were being used to the best possible effect on behalf of the consumers.

Mr. **Bedell**. I think I can understand quite clearly that you might not be able to enforce every infraction that comes up. That is something, in this gentleman's opinion, completely different from saying to all of the public, "Look, these things are against the law. We recognize they are against the law. But you need to know that, because we don't agree with that, you can go ahead and violate the law as much as you want to, as long as you don't do these certain things." That is telling everybody to go ahead and violate the law.

It is quite a different thing if I don't know whether I am going to get picked up for speeding or not, because they can't catch everybody and prosecute everyone who is speeding. It is quite a different thing to say the law says you can only go 55 miles an hour, but we are not going to prosecute anybody who goes 80 miles an hour as long as they do it out on the rural roads, or whatever it may be. When you do that, you are taking the law in your hands rather than leaving it up to the Congress to determine the law.

Government has to operate properly. If you were sitting here in the Congress faced with a Justice Department official who said, "We are going to take the laws that are passed by the Congress and interpreted by the Supreme Court, and we are going to decide ourselves that we are going to tell people you don't have to obey those laws if you don't want to," I would think that you would be terribly disturbed.

Mr. **BAXTER**. We have never told anybody that they don't have to obey the laws.

Mr. **BEDELL**. What are you doing when you say to us right here that when you receive a complaint about resale price maintenance, you conduct an inquiry to determine whether the particular practice is truly anticompetitive, that is, whether it facilitates horizontal collusion? Does that say that you are not going to prosecute?

Mr. **BAXTER**. We are responding to your question and telling you how we allocate our resources.

Mr. **BEDELL**. Your resources, you are allocating them so that you are telling people, "Look, if this does not facilitate horizontal collusion, we are not going to prosecute you."

Mr. **BAXTER**. We are unlikely to devote enforcement resources to it. But the law is that the behavior is unlawful per se, and you will undoubtedly have a large number of private suits.

Mr. **BEDELL**. But the Government isn't going to do anything about this?

Mr. **BAXTER**. We are not going to use our enforcement resources.

Mr. **BEDELL**. Gosh, Mr. Baxter, I go back and I talk to my people back there and they can't understand some of the things about how Government operates. I wish they could be in Congress. I wish they could hear what we are just hearing here. We are hearing you telling us, very clearly, that you think it is up to you to determine under what circumstances you are going to enforce the laws that the Congress passes. Not only that, but you are going to tell the people under what circumstances you are going to enforce those laws.

I don't want to fuss with you, Mr. Baxter. We want to get along. We want Government to operate properly, and so on. But I just have to tell you that if Mr. Dorgan was upset with what he heard, I am just twice as upset.

We are trying to do the best that we can here. We are trying to do what we can. If our laws are wrong, somebody ought to come to us and tell us to change them. Lots of laws are wrong. You may well be right that the laws are incorrect. But if what you are going to do is go and tell everybody that, "Where I think the laws are incorrect, I am not going to enforce them," then I think we have just got a mess in our society that we are never going to get over.

I have missed a quorum call because I feel this is so important. I believe it is important for our Government to operate properly. You and I might agree or disagree on whether it would be good to have 100 corporations or whether you ought to worry about these things, but I would hope we would not disagree on one thing: I would hope we would agree that we ought to have specific details and duties of various divisions of Government.

I would hope we would agree that one of its jobs is that Congress is supposed to, in its best judgment, pass laws according to what it deems is correct, those are to be interpreted by the Supreme Court, and enforced by the Justice Department. I would hope we would agree that it is not up to the Justice Department to make up its mind which laws are good and which are bad, and say they are going to enforce the ones they think are good and not enforce the ones they think are bad.

I don't think a society can operate that way. You and I just plain disagree on how Government needs to operate. That is the way society works, I guess—in disagreement. But I would be very, very unfair to you if I didn't let you know that I think what you are doing is just a tremendous disservice to trying to make Government operate effectively.

Mr. **Baxter**. We certainly agree that Government should operate properly. That doesn't take one very far. But anybody who is in the position of having enforcement responsibilities obviously has to decide which cases to bring and which cases not to bring. For many, many years, a series of Assistant Attorneys General brought cases that had never previously been suggested were violations of the antitrust laws. Those efforts were generally regarded as imaginative, heroic and courageous, and they pushed the law in one direction. No one ever suggested that they were not faithfully enforcing the laws. But as soon as someone suggests that some of those applications don't make much sense, then the suggestions are very, very different.

I do not understand this one-way ratchet concept of administrative duty. But, again, I would say that I regard probably the central responsibility of law enforcement as deciding how effectively to allocate resources to achieve the purposes that the Congress has expressed in enacting statutes.

Mr. **Bedell**. But that is not what you are doing.

Mr. **Baxter**. That is indeed what I am doing.

Mr. **Bedell**. No, you are not. You are deciding how to allocate your resources to do what you think is the proper thing and what should have been done by the Congress and what laws should have been passed by the Congress and what the Supreme Court should have said.

I have no argument with the rest of what you say. But you are not only doing that, you are telling everybody that this is the way we are going to enforce them. You have done that right here. I understand that you can't enforce every infraction. I understand cases are different. I understand that some of them should be prosecuted and some of them should not, according to the infraction. But that is not what you are doing, Mr. Baxter. What you are doing is you are saying, "I am going to enforce the parts of the law that I agree with, and I am going to tell everybody in our society that those things that I don't agree with, I am not going to enforce." At least that is the way I read it. I don't see how anybody can read your testimony or what you said or anything else any differently. You may be right and we may be wrong as to whether those should be enforced or should not, but the fact of the matter is, in my opinion, Government cannot operate properly if your Department thinks that it has the right to tell all of society that, "We don't agree with this part of the law, so you go ahead and violate the law if you wish, as long as you don't do some of these things with which we do not agree."

I yield back the balance of my time, Mr. Chairman.

Mr. **Luken** [presiding]. Thank you, Mr. Bedell.

You will be happy to know we only have a few moments. Maybe you won't be happy to know. In any event, for whatever effect it has, there will be a vote, maybe a series of votes, in a few moments on some rather important matters. So, I think we are going to have to conclude the proceedings for the day at that time.

Mr. Baxter, I haven't been present for all of Mr. Bedell's questioning and his comments, but I got the impression when Mr. Daub was questioning you that at least he was under the impression that you really hadn't criticized the decisions of the Supreme Court in this area of price maintenance.

Mr. **Baxter**. That would be a mistaken impression. I didn't understand him to say that.

Mr. **Luken**. At least by omission, he went through a lot of negatives as to what you didn't do.

You are in disagreement with the per se rule, are you not?

Mr. **Baxter**. I most certainly am.

Mr. **Luken**. That is a rule that the Supreme Court has laid down interpreting the acts of Congress?

Mr. **Baxter**. Yes.

Mr. **Luken**. What act of Congress is that?

Mr. **Baxter**. Section 1 of the Sherman Act.

Mr. **Luken**. What does that do?

Mr. **Baxter**. Section 1 of the Sherman Act forbids——

Mr. **Luken**. The ones in the particular area that you are criticizing in the Supreme Court decisions.

Mr. **Baxter**. These are arrangements in which a manufacturer tells a retailer the price he would like the retailer to resell the goods if they are to deal with one another.

Mr. **Luken**. That is price maintenance, isn't it?

Mr. **Baxter**. That is resale price maintenance.

Mr. **Luken**. That is under the Robinson-Patman Act?

Mr. **Baxter**. No. The Robinson-Patman Act does not cover that practice. That act covers a rather different set of practices.

Mr. **Luken**. This is just under the Sherman Act?

Mr. **Baxter**. Section 1 of the Sherman Act.

Mr. **Luken**. We have had the criticism here today that, in effect, you have announced you will not enforce the legal prohibition against resale price maintenance except when, according to your economic views, it will be desirable to do so. What would be your comment on that?

Mr. BAXTER. My comment on that is that there are a variety of circumstances in which resale price maintenance can damage consumers, and a number of circumstances in which it cannot.

Mr. LUKEN. Do you decide when it shall damage consumers?

Mr. BAXTER. Yes.

Mr. LUKEN. By what guidelines?

Mr. BAXTER. By economic analysis.

Mr. LUKEN. Not by any guidelines set forth in the legislation?

Mr. BAXTER. No. There are no guidelines set forth in the legislation.

Mr. LUKEN. Certainly not by any guidelines set forth by the Supreme Court.

Mr. BAXTER. No; that is correct.

Mr. LUKEN. You don't follow the Supreme Court?

Mr. BAXTER. There are no such guidelines set forth by the Supreme Court.

Mr. LUKEN. You disagree with the Supreme Court. You are lobbying in the courts. You are filing amicus in private cases.

Mr. BAXTER. That is correct.

Mr. LUKEN. To change the rulings of the Supreme Court.

Mr. BAXTER. The lower courts as well.

Mr. LUKEN. It is the Supreme Court we are talking about.

Mr. BAXTER. In the Supreme Court as well.

Mr. LUKEN. Not in the rulings of the Supreme Court.

Mr. BAXTER. We are filing amicus briefs in the Supreme Court urging it to change prior rulings, as it has done, of course, many times in the past.

Mr. LUKEN. This gives many people problems because you then become an advocate for overturning the law instead of an enforcer, instead of an official who carries out the execution of those laws.

Mr. BAXTER. I see nothing incompatible about those activities. Each of those activities is a time-honored tradition.

Mr. LUKEN. It may be as a small part of your job. But it appears that this is the major thrust of your version of your job, of your vision of what you should be doing.

Mr. BAXTER. I regard it as an important part.

Mr. LUKEN. Are you enforcing the per se rule?

Mr. BAXTER. We are enforcing the law against resale price maintenance whenever it seems to us at all likely that damage to consumers is likely to result.

Mr. LUKEN. People are getting the idea that, since you are filing these amicus briefs against this per se rule that the Supreme Court has laid down——

Mr. BAXTER. We haven't, incidentally, filed any briefs on that particular point.

Mr. LUKEN. If you haven't filed a brief, that is about the only thing you haven't done about it, right? You have shouted from the housetops that you disagree with it. Aren't you trying to overturn that?

Mr. BAXTER. I have tried to make our views unambiguously clear, that is correct.

Mr. LUKEN. How are you trying to overturn it if you didn't file any briefs? You have done it in other cases.

Mr. **Baxter**. We have filed amicus briefs on other issues. We have not had an occasion to file an amicus brief on this issue, but we are looking for an opportunity to do so.

Mr. **Luken**. We have a criticism from Professor Flynn who says that the proposal, Mr. Baxter, to selectively intervene in private suits is an unwise, as well as unauthorized step because the enforcement agencies will find themselves besieged by lobbyists pleading for Government intervention on one side or the other in many, if not every private case. Do you foresee a danger of that kind?

Mr. **Baxter**. I see that as a realistic concern. We have indeed had people lobbying us, if you would like to put it that way.

Mr. **Luken**. Do you think Congress made a mistake repealing the fair trade laws?

Mr. **Baxter**. Not at all. I supported repeal of the fair trade laws for years.

Mr. **Luken**. But this effort of yours certain runs directly counter to the intent of Congress in repealing them.

Mr. **Baxter**. I have no reason to think that. The fair trade laws were a mistake. They bear no resemblance to my present position. They had very harmful economic consequences.

Mr. **Luken**. Didn't they involve price maintenance?

Mr. **Baxter**. Yes, indeed, they did. They authorized resale price maintenance across an enormous variety of commercial circumstances that bore no relationship whatsoever to the distinctions I am presently making.

Mr. **Luken**. What is the distinction? You seem to generally approve price maintenance across the board.

Mr. **Baxter**. No, that isn't true.

Mr. **Luken**. You make some very broad statements to the fact there is no such thing as a vertical problem. Isn't that what you say?

Mr. **Baxter**. Yes, I have said there is no such thing as a vertical problem. However, I have repeatedly said that vertical arrangements can give rise to horizontal problems in some circumstances.

Mr. **Luken**. If there is no such thing as a vertical problem, then why are you opposed to the fair trade laws?

Mr. **Baxter**. Because they gave rise to horizontal problems.

Mr. **Luken**. You have decided this?

Mr. **Baxter**. They facilitated collusion among manufacturers in some circumstances and collusion among retailers in others.

Mr. **Luken**. But not between manufacturers and retailers.

Mr. **Baxter**. Manufacturers and retailers deal together day in and day out. They necessarily have contractual arrangements of many kinds. Those arrangements sometimes give rise to horizontal problems, typically collusion. When they do, they are troublesome; when they don't, they are not troublesome.

Mr. **Luken**. You have been widely quoted in the Washington Post, and this quote comes through a number of these witnesses as to your disagreement with the present law. You are quoted as saying that the disagreement is not about the present state of the law so much as whether that law really makes sense; is that not your quote?

Mr. Baxter. It probably is. I don't remember using exactly those phrases, but I have no difficulty with that expression.

Mr. Luken. Isn't that the law that the Congress passed that you are talking about?

Mr. Baxter. No. That is the law that the Supreme Court has announced.

Mr. Luken. It is the law the Supreme Court has announced.

Mr. Baxter. Right.

Mr. Luken. You are saying that doesn't make sense.

Mr. Baxter. That is correct.

Mr. Luken. That doesn't give you any problem that you are making these statements that it doesn't make sense and that your avowed purpose is to change that law rather than to carry it out?

Mr. Baxter. No, it doesn't give me any problem at all.

Mr. Luken. Did we hire you as an advocate to change the law?

Mr. Baxter. The President appointed me explicitly for that purpose.

Mr. Luken. To change the law? Maybe we should ask the President. Did he state that in your commission?

Mr. Baxter. No, I didn't talk with the President. I should have said the Attorney General did.

Mr. Luken. When he gave you your commission, was that in writing to change the law?

Mr. Baxter. No; it was oral.

Mr. Luken. Was it public?

Mr. Baxter. We understood it to be an important part of the job.

Mr. Luken. Was it a private agreement between you two, or did you let the rest of us in on it?

Mr. Baxter. I talked about it quite extensively at my confirmation hearings.

Mr. Luken. About the Attorney General's injunction to you?

Mr. Baxter. No; it was about my view of the proper application of the antitrust laws.

Mr. Luken. Could you give us some idea of the quote that you gave to the Senate at the time of your confirmation about how you were going to spend most of your time changing the law rather than enforcing it? Is that what you told them?

Mr. Baxter. I am sure I didn't put it that way. I haven't spent most of my time in that way.

Mr. Luken. You have spent a good deal of it. You have an awful lot of material here.

Mr. Baxter. I cover a lot of territory in a day.

Mr. Luken. Let's go on. The Supreme Court has said, as you have said now and said before apparently on a variety of occasions that "Vertical price fixing is per se illegal. It is the position of the Antitrust Division that this practice should not be illegal per se in view of certain competitive principals." Is that an accurate statement of your position?

Mr. Baxter. I don't think that is an accurate quotation, but I have no trouble with the substance of it.

Mr. Luken. You have already said that that is what you want to do, you want to change the Supreme Court's interpretation.

Mr. **Baxter**. I would be more apt to say that I would like the Supreme Court to change its own interpretation, as it has on so many occasions in the past.

Mr. **Luken**. I am trying hard to see a difference there, but I haven't succeeded as yet.

I believe this is in your letter, and just elaborating, in the context of a competitive market, if resale price maintenance does no more than achieve artificially high prices at the distribution level, it would never be in the interest of either the manufacturer or the distributor to employ the practice. That is what you said, did you not? Aren't those your sentiments?

Mr. **Baxter**. I think that is an accurate statement of fact. I don't recall using those precise words.

Mr. **Luken**. I am looking at the context, and I don't think they could be taken out of context.

I can't understand that statement, to tell you the truth, because it seems elementary to me, and I thought almost everyone else, that an agreement between the manufacturer and the seller for price maintenance which achieves artificially high prices has the obvious benefit to both of higher profits.

Mr. **Baxter**. No, it doesn't at all.

Mr. **Luken**. In the short run, certainly.

Mr. **Baxter**. No, not even in the short run. In the short run, what it does is cut down on the volume of product that a manufacturer is able to sell, and what he has ordered the retailer to do is to charge a price that creates a very wide margin for the retailer. Why should a manufacturer adopt a practice that force feeds profits to retailers, and cuts down its own volume of sales at the price at which it chooses to sell to a retailer? Now, of course, if the manufacturer raised its own price to the retailer, that would be more readily understandable——

Mr. **Bedell**. Would the gentleman yield?

Mr. **Luken**. You have just injected something into the quotient, into the formula.

Yes, I will be glad to yield.

Mr. **Bedell**. I don't want to take time, but obviously if a manufacturer says that his product is supposed to be sold at a higher price at retail level, he is then in a position to charge a higher price to the retailer and make a bigger profit.

Have you ever been involved in manufacturing, Mr. Baxter?

Mr. **Baxter**. A manufacturer was in a position to charge a higher price to the retailer without telling the retailer anything about the price at which the retailer was to sell.

Mr. **Bedell**. The fact is that is not the case as long as he has to face competition and is going to compete in the retail market. Have you ever been in manufacturing, Mr. Baxter?

Mr. **Baxter**. I have never been in manufacturing, although I have represented a variety of manufacturers.

Mr. **Bedell**. I would suggest that before you make a statement such as you have just made, you try to check with some manufacturers to find out how it works, because, sure as heck, if a manufacturer can say that it is going to be sold at a higher retail price, he can get a higher price from the retailer than if a retailer has to sell at a much lower price. If you think that is the case, then for gosh sakes, somebody better get over there and do some educating in the Justice Department, in this gentleman's opinion.

Mr. BAXTER. I think that is the case, so perhaps someone should.

Mr. LUKEN. Mr. Bedell and I are of one mind on that, which we both stated in our own words. I am just astounded by that statement, and obviously Mr. Bedell is, too. I really think most people would be. Wasn't that one of the bases of the fair trade laws?

Mr. BAXTER. I am not sure I even understand that question.

Mr. LUKEN. The fair trade laws were advocated by the manufacturers; weren't they?

Mr. BAXTER. Historically, the fair trade laws were advocated by the retail merchants or their trade associations, the National Association of Retail Druggists, and so on.

Mr. LUKEN. But the manufacturers didn't support them?

Mr. BAXTER. Much later; historically.

Mr. LUKEN. Did it take a long time for it to dawn on them that they could make more money that way?

Mr. BAXTER. I don't know exactly why they became active politically later on, but they did support them actively, although not at the time of their initial passage.

Mr. LUKEN. Let me ask you just two more questions. I have here a press release put out by a certain Senator that in a February 22, 1982, memo to Antitrust Division attorneys, you declared that the notion that, "price stabilization agreements are automatically illegal is idiocy of an even higher order."

Mr. BAXTER. Higher order than what?

Mr. LUKEN. I thought maybe you could help me. It is supposed to be your memo.

Mr. BAXTER. Yes, but your question is incomplete, in that respect.

Mr. LUKEN. That is why I have asked you.

Mr. BAXTER. Yes; there is one particular sentence that the lawyers in the Antitrust Division were fond of quoting from the *Socony- Vacuum* case. The *Socony-Vacuum* case reached quite unobjectionable results, so I have no particular criticism to make of the results in that case, or indeed large portions of the opinion. But there was one very sweeping generalizations in the middle of the opinion that asserted that maximum price-fixing agreements and price-stabilization agreements were to be treated exactly the same as, and had the same effects as, horizontal minimum price-fixing agreements.

Mr. LUKEN. Is this the *Maricopa* case?

Mr. BAXTER. No; this was a 1941 Supreme Court decision.

I wrote a memo to the attorneys in the Antitrust Division pointing out that the economic effects of maximum price-fixing agreements and the economic effects of stabilization agreements were different from one another, and that both were different from minimum price-fixing agreements, as indeed one would intuitively guess. In particular, I urged them not to include the word "stabilization" in these sweeping condemnations that they were engaging in because stabilization agreements, in a wide variety of concepts, are very, very useful devices. Essentially, futures and commodities markets of all kinds are at bottom stabilization agreements.

What I said in that memo was that the generalization that stabilization agreements were always harmful was even more foolish than the generalization that maximum price-fixing agreements were always harmful. That is the portion of the sentence that is omitted in that particular quotation.

Mr. **Luken**. Do you believe that minimum price stabilization is just harmful as maximum?

Mr. **Baxter**. I believe that horizontal minimum price-fixing agreements are indeed almost always socially harmful. I think that generalizations about the effects of either stabilization agreements or maximum price-fixing agreements are much more difficult to make.

Mr. **Luken**. I think we have covered it.

Finally, I believe you told the House Judiciary Committee that court doctrines and rulings attacking vertical mergers are "almost totally incoherent. There is no such thing as a harmful vertical practice."

Mr. **Baxter**. Yes.

Mr. **Luken**. You have said this on a number of occasions, or words to this effect.

Mr. **Baxter**. Yes.

Mr. **Luken**. I certainly join with my colleagues in being somewhat incredulous at the lengths to which you have gone in flouting the law and not enforcing the antitrust laws in the respects we are talking about, supporting price maintenance and so-called stabilization.

If there is nothing further that you have to add at this point, I am afraid we are going to have to adjourn, because we may have more than one vote on this. Though we have not been able to hear all of the testimony that we wanted to today, we will have to get back to those witnesses whom we have not heard from.

Mr. **Bedell**. I have just one further question. I know we have just about a half a minute.

Mr. Baxter, you indicated that when you took this job, you were charged with trying to see about getting the law changed.

Mr. **Baxter**. Yes.

Mr. **Bedell**. What have you done in order to try to change the law?

Mr. **Baxter**. Since we have no quarrel with the language of the statutes as Congress passed them, and regard that language as perfectly satisfactory, and because our quarrel is with interpretations that have been placed upon them by the courts, the primary thing we have done is go to the source of the problem, that is to say, the courts, and urge them to change their interpretations.

Mr. **Bedell**. Thank you.

Mr. **Luken**. When you say the state of law, you are talking about the state of law as interpreted by the Supreme Court.

Mr. **Baxter**. And the lower Federal courts.

Mr. **Luken**. You haven't attacked the law itself?

Mr. **Baxter**. The phraseology in the statutes, I find quite satisfactory.

Mr. **Luken**. Thank you very much, Mr. Baxter.

Mr. **Baxter**. Thank you, Mr. Chairman.

Mr. LUKEN. Again, I hope that we have extended courtesies to you. We have disagreed in good humor and good spirit. We appreciate your attending and for your openness in responding to our questions.

Is there something you wanted to add?

Mr. BAXTER. I said during my testimony a few minutes ago that the Washington Post story was based on reference to other testimony but not on an interview with me. I am told by my special assistant that is not correct, that there was an interview shortly before I left for Japan and that story based in part upon that interview. I am sure he is right, although I still don't recall it. So I would like to correct the record in that respect.

Mr. LUKEN. Thank you for that.

I will ask unanimous consent the record remain open for 5 legislative days to receive statements and materials pertinent to these hearings. We will have further continuation of subcommittee consideration of this subject at a later date.

Thank you again.

[Whereupon, at 4 p.m., the subcommittee was adjourned.]

[The following submissions for the record were received by the subcommittee for insertion:]

PREPARED STATEMENT OF HON. MICHAEL PERTSCHUK, COMMISSIONER, FEDERAL TRADE COMMISSION

I have voted to allow Mr. Campbell to testify so that the Committee could hear his views about Robinson-Patman Act and resale price maintenance enforcement. However, I wish to make clear that I disagree with both the economic philosophy of Mr. Campbell, as well as Chairman Miller and Antitrust Division Chief Baxter, in regard to these two areas, and with the antitrust enforcement strategies they appear to favor.

The law concerning resale price maintenance is quite clear. The Supreme Court has stated more than once in the last few years, in the *Sylvania* [1] case in 1977 and again in the *Midcal* [2] case in 1980, that resale price maintenance is per se unlawful. The Commission (Chairman Miller, dissenting) has also recently stated that resale price fixing is per se illegal.[3]

Congress in 1975 repealed the Miller-Tydings Act in order to end the practice of immunizing resale price fixing from antitrust scrutiny through state fair trade laws. This measure was advocated by the Ford administration in the name of fighting high prices for consumer goods by spurring competition. The Senate Report for the bill repealing Miller-Tydings stated:

"Repeal of the fair trade laws was called for by President Ford, consumer groups, the Justice Department, the Federal Trade Commission, the Council on Wage and Price Stability, discount stores and smaller business associations. Editorials in newspapers across the country unanimously favored repeal.

"Opponents were primarily service-oriented manufacturers who claimed retailers would not give adequate service unless they were guaranteed a good margin of profit. However, the manufacturer could solve this problem by placing a clause in the distributorship contract requiring the retailer to maintain adequate service. Moreover, the manufacturer has the right to select distributors who are likely to emphasize service. . . .

"Studies by the Department of Justice which were cited in a 1969 Economic Report of the President, indicate that consumers would be saved $1.2 billion a year by the elimination of the fair trade laws. Updated for inflation this figure comes to $2.1 billion. Another study of the Department of Justice estimated that fair trade laws increase prices on fair traded goods by 18–27 percent. For example, a set of golf clubs that lists for $220 can be purchased in non-fair trade areas for $136; a $49 electric shaver for $32; a $1,360 stereo system for $915 and a $560 19-inch color television for $483."

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[1] *Continental T.V.* v. *G.T.E. Sylvania, Inc.*, 433 U.S. 36 (1977).

[2] *California Retail Liquor Ass'n* v. *Midcal Aluminum, Inc.* 445 U.S. 97 (1980).

[3] *Russell Stover Candies, Inc.*, Docket No. 9140 (final order, July 7, 1982).

We would do well to remember the results which followed from that action. Prices for many consumer goods dropped dramatically and discounting became a frequent practice for stereos, radios, luggage, and other consumer items.

Now, the principal antitrust officials appointed by President Reagan want to turn back the clock on these developments and to impose by administrative fiat a version of antitrust law at odds with Supreme Court opinions. I do not question the sincerity of their beliefs or their right to try to persuade Congress to change the law. I do, however, have serious doubts about their authority to try to change the law on their own.

A related disagreement I have with the Reagan administration's policies concerns the distinction between allocation of resources to the most significant or egregious cases of law violations and adopting a policy which *de facto* immunizes certain conduct which is unlawful. For example, both the FTC and Justice should commit more resources on national horizontal price-fixing cases than to local cases. However, to the extent that interstate commerce requirements are met, we would never want to signal to potential price fixers at the local level that they are immune from FTC or Justice scrutiny. The small chance that they will be pursued, together with their clear understanding of the rules they must obey, result in widespread compliance with the prohibitions on horizontal price-fixing.

Similarly, we should concentrate on resale price maintenance and Robinson-Patman violations which are most significant and competitively harmful, as a matter of prosecutorial discretion. The Commission has done this, for example, in bringing Robinson-Patman cases. Over the last decade, in particular, the Commission has focused on Robinson-Patman violations where more significant injury occurred. Some reports in the trade press, however, suggest that many manufacturers are beginning to believe from the public statements of Federal antitrust officials that they are effectively immunized from resale price maintenance or Robinson-Patman enforcement at the Federal level. When Mr. Campbell or Chairman Miller or Mr. Baxter say they want to bring resale price maintenance or Robinson-Patman cases when they "make economic sense" or "harm consumers," it's hard to disagree with such an abstract proposition. The real question is whether that position amounts, in practice, to changing the law without telling the rest of us.

PREPARED STATEMENT OF HON. PATRICIA P. BAILEY, COMMISSIONER, FEDERAL TRADE COMMISSION

As the Director of the Bureau of Competition makes clear in his prepared testimony, the views expressed are his own, and not "necessarily" those of the Commission. Indeed it should be clear with regard to resale price maintenance that the Commission recently issued an opinion reconfirming the *per se* illegality of that practice. Mr. Campbell is of course entitled to his belief that the Supreme Court is "wrong" in its consistent decisions since 1911 on this subject, but I must clearly disassociate myself from that view.

As far as Robinson-Patman enforcement is concerned, there is more to the story than appears in the Bureau Director's testimony. The Robinson-Patman Act is an exceptionally complicated and controversial law. Economists are, virtually without exception, opposed to its enforcement except in a very few areas of price activity that are already violative of the other antitrust laws. In addition, the Act is exquisitely difficult for lawyers to use because of the well-known complexities of its draftmanship, and the burdens of proof a successful case necessarily carry with it. The courts, for their part, have taken an increasingly restrictive view of Robinson-Patman liability. In the past decade, the Act has seen exceedingly spare application at the Commission as the appendices to the Bureau Director's testimony make clear. As a practical matter, unless the Congress directs a change in the prevailing view of the limited application of the Robinson-Patman Act, the Congress should expect to see few, if any, recommendations for complaints from the Bureau. The reassuring technical existence of a few investigations, constant over time, should not be confused with litigation recommendations, which are always the true test of antitrust enforcement intentions in this area, as in the area of resale price maintenance.

Prepared Statement of Dr. William Lovett, Professor of Law and Economics, Tulane Law School, New Orleans, La.

Mr. Chairman and members of the Committee. Thank you for this opportunity to testify on the problems of small business under present antitrust law relating to price discrimination, vertical restraints, and related exclusionary practices. These hearings are especially timely now, because years of high interest rates, stagflation, widespread excess capacity, and sluggishness in many industries have put a large number of businesses under serious strain. In these circumstances it is important that antitrust law and remedies be assessed realistically for their contribution to an environment in which small, medium, and large businesses try to struggle fairly for their proper share in our marketplace.

We must always remember how important small and medium-sized businesses are for the economic, political and social vitality of our nation. Smaller business in every sector, from agriculture through forestry, mining, energy, manufacturing, distribution, finance, services, technology development, and professional activities plays a crucial role. Smaller business serves as a competitive discipline, a wellspring for new entry, investment, and innovation, and as a check upon the excessive size, sluggishness, waste, and irresponsibility that sometimes afflicts big business aggregations. And we must understand the function of smaller business in fostering social mobility, in providing the multiple channels for career advance, fulfillment and progress that have been so productive in American history, and are just as important to our younger people today.

The regime of antitrust law, its enforcement by government and private parties, and where appropriate, the procompetitive, decentralizing thrust of sound regulatory policy, are vital to smaller business enterprise. Without this legal framework that ensures fair and truly free competition, there is a constant danger that much more powerful business corporations, often gaining favored regulation and subsidy from government, will further erode and limit the corrective vitality of smaller business enterprise. This responsibility for procompetitive activism, as a watchdog of the marketplace and public interest, is the central theme of the American antitrust tradition. It has gained worldwide respect, and growing imitation in many countries.

For discussion in these hearings, you are considering some key aspects of antitrust policy, the problems of price discrimination, vertical restraints, and related exclusionary practices. Within this area I will concentrate mainly on price discrimination and the Robinson-Patman Act, subjects where I've had more background than most antitrust scholars.

A few words will be helpful on my own background in the antitrust field. I've been in the antitrust "business," we might say, for 23 years, since the summer of 1960, when I began working on the defense side for Westinghouse Electric Company, in the great heavy electrical equipment price-fixing conspiracy case. During most of the 1960's I served in Washington, first as a lawyer with the Antitrust Division, and then as a staff economist with the FTC. During these years I completed my Ph. D. in economics, with a good mix of teachers from Harvard, the Chicago School, Michigan State, and Wisconsin. In the mid-1960's I did my first major work on Robinson-Patman, which was a systematic review of all the "R-P" and exclusionary practice cases brought by the FTC between 1955–65. Some of this work became Chapter V, "Market Conduct," The Structure of Food Manufacturing, Technical Study No. 8, National Committee on Food Marketing, June, 1966. This and later efforts led to my legal policy article, "A Crossroads for the Robinson-Patman Act," 45 Tulane Law Review 1 (December, 1970). More recently, I've had an active consulting practice as an antitrust economist, with some 40 cases in 13 years. A large proportion of these have been smaller business antitrust actions, about 15 of them involving price discrimination or "R-P" claims. This work, along with 13 years of antitrust law teaching, has forced me to keep up with this intriguing area of controversy.

The first part of these remarks is a summary of how price discrimination law reached its present status. The second will be advice on where we should go from here.

There have been six major phases in price discrimination law since the Sherman Antitrust Act was enacted in 1890. The first, 1890–1910, included no real law or cases on the subject, except the general rules against "monopolizing" and "restraint of trade." The second, 1910–14, featured the big *Standard Oil* and *American Tobacco* decisions, which held predatory pricing unlawful when combined with mergers to achieve market dominance. But these decisions limited predatory pricing only in the most aggravated degree. The third, 1914–36, brought the first specific statute against price discrimination, section 2 of Clayton, which tried to outlaw anticompetitive price discrimination at the incipient stage, i.e., when it "might tend to create a monopoly or substantially lessen competition in any line of commerce in any section of the country." This attempt failed for lack of enforcement effort, and because the statutory mandate was too vague for easy enforceability. Extensive evidence of a broad pattern of pricing discrimination was needed for such illegality, and it was hard to gather the initial quantum of evidence needed to justify such an investigation. The original section 2 of Clayton was virtually a dead letter, with little or no impact.

The fourth phase, the Robinson-Patman Act of 1936 as enforced into the early 1960's, brought our first serious, systematic effort to suppress anticompetitive price discrimination. "R-P" (as most antitrusters label it) amended the original section 2 of Clayton by adding alternative grounds for illegality, "price differences" that would injure "competitors or their customers." This reduced the burden of proof substantially, so that investigations could be started with more limited proof, and cases could be developed in reasonable time by the FTC staff or private parties. Extensive enforcement began, small business organizations actively supported the program, and considerable compliance impact was achieved.

Three defenses were provided in the Robinson-Patman Act: (i) cost justification; (ii) distress selling; and (iii) meeting competition. Cost justification was interpreted to mean "average" costs, so that real pro rata cost savings in dealing with particular classes of buyers could allow price discrimination to that degree. Distress sales were a sensible exception and never really controversial. And the meeting competition defense meant one could meet the discount prices of rivals, but not, generally speaking, beat them unless your price schedule for comparable buyers was reduced accordingly.

Criticism came from two directions. Those favoring a stronger enforcement policy complained that illegality was confined to "goods of like grade and quality," and this allowed major loopholes for product differentiation, private label discounts, and discrimination in services. Those wanting to cut back on enforcement efforts complained of significant overkill. Even some antitrust enthusiasts worried that "R-P" enforcement might increase pricing rigidity in oligopolistic industries. Consensus pricing, they believed, could be facilitated by "R-P" enforcement drives in many industries.

In any event, deeper discounts to big buyers were inhibited to some degree in these years. And a more effective remedy now existed against anticompetitive, predatory or "primary line" price discrimination that injured smaller business competitors. Antitrust lawyers became familiar with "R-P," and industry compliance was reasonably widespread, if not universal.

The fifth phase, say the mid-1960's through the mid-late 1970's, featured a significant increase in the burden of proof for competitive injury by the circuit courts and the FTC itself. This was a gradual response to the overkill complaint, and the fear of undue pricing rigidity. Enforcement was not abandoned entirely, but became less frequent, especially in the secondary line, deep discount cases. But predatory practice, primary line price discrimination cases remained viable, and were increasingly brought by private counsel representing smaller business. *Utah Pie* v. *Continental Baking Co.*, 386 U.S. 685 (1967) merely illustrated a large number of such litigations, many of which were settled successfully among counsel for reasonable amounts. Bear in mind that private antitrust lawsuits became much more common in the 1960's and 1970's generally.

The sixth phase, late 1970's into the early 1980's involves some court decisions imposing even greater requirements of proof, and new leadership at the FTC, substantially more hostile to "R-P" enforcement and small business assistance. Primary line cases, if well litigated by private plaintiffs, are still viable. But counsel for defense are eager to exploit greater opportunities for enlarging trial records, increased delay, and enhanced bargaining power. The art of successful plaintiff litigation has become more difficult, expensive and risky. Greater working capital is required for plaintiff counsel, and from injured small businesses. But many victims of predatory price discrimination are so weakened that they simply cannot afford adequate legal relief. In my experience, defendants normally outspend plaintiffs by large amounts, often as much as five or ten-fold. This means not only a great difference in the scale of preparation and billable hours, but more sadly, the quality of counsel available to smaller business is often outmatched by the top line law talent hired routinely by larger corporations.

Meanwhile, secondary-line enforcement and compliance momentum is even weaker. Some respectable scholars even propose marginal-cost discount authority that would virtually emasculate secondary line R-P enforcement, and substantially weaken the likelihood of effective remedies against predatory pricing.

Now we face the question, what can and should be done about this situation. First, we should reassess the need and prospects for pro-competitive "R-P" enforcement. Second, we should install leadership in the antitrust agencies (especially the FTC) that takes a more friendly, helpful and systematic line toward ensuring fair treatment and opportunity for small business.

On the first point, my own economic analysis, litigation experience, and extensive review of "R-P" literature leads to the following conclusions as to the desirability of "R-P" enforcement:

(i) Moderate enforcement by the FTC and private parties in the style of the mid-late 1960's into the 1970's worked well enough in tending to limit and remedy the more serious outbreaks of predatory pricing. Increased burdens of proof for competitive injury had largely eliminated the earlier problems of overkill. And the network of "R-P" enforcement, especially from private counsel, tended to keep predatory pricing within narrow limits. We should restore this era of moderate "R-P" enforcement for primary line price discrimination, and allow small business more effective remedial protection.

(ii) The problem of secondary line enforcement requires more subtlety and good judgment by the FTC staff itself. Greater care must be exercised to ensure that enforcement is concentrated on those markets where deep discount, big buying power leads to two track (or multiple layer) pricing structures that are harshly discriminatory, and go significantly beyond cost-justified levels. In many markets, by contrast, normally those with looser oligopolies and lower concentration levels, aggressive buying power tends to be procompetitive, and bigger buyers and small business buying groups help break up the pricing front of sellers facing them. The FTC has an ample economic staff and budget to make these "subtle" judgments under proper leadership, and allocate its secondary line enforcement efforts to those markets where big buying power tends, in fact, to yield anticompetitive results.

The overall need for such an enforcement program is still summed up very well in these words:

"Market structure influences in considerable part the opportunity for anticompetitive conduct. Where markets are atomistically structured, there are not opportunities for anticompetitive conduct. Firms sell as much as they want at the going price. They maximize profits by producing efficiently and by managing their production to include the most profitable combination of products.

"In oligopolistically structured markets, however, where concentration is relatively high and barriers to entry are significant, conduct takes on other dimensions. Firms recognize their interdependence and competitive interactions cease to be impersonal. Principal competitors are identified and reckoned with more or less individually. Success in selling becomes more important than efficiency in production. In this setting there are opportunities for anticompetitive conduct. This conduct may include collusion, exclusionary policies such as tying arrangements or refusals to deal, predatory practices and price discrimination. Price discrimination is particularly important where there is concentration on the buying side of the market as well as on the selling side."

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"Anticompetitive acts and practices are most harmful where competitive forces are weak, i.e., in market structures typified by high concentration, extensive product differentiation efforts, and significant barriers to entry," From Chapter V, "Market Conduct," *The Structure of Food Manufacturing,* Tech. Study No. 8, Nat'l Comm'n on Food Marketing, June, 1966, pp. 149–150.)

All of my experience in economics and with antitrust litigation in the past 16 years has tended to confirm this generalization. In fact, I would add, roughly one third of the American economy is rather highly concentrated, one third moderately so, and another third more competitively structured. And in many regional markets, even in industries with moderate or lower concentration, there are frequent pocket of higher local concentration with significant entry barriers.

Anticompetitive, exclusionary practices and price discrimination can occur in any of these markets when there is substantial concentration and significant entry barriers. The opportunity for abuse exists in these situations, and such malpractices need to be inhibited by reasonable, moderate antitrust and "RP" law enforcement. Without these or equivalent legal remedies, the opportunity for abuse will, inevitably, be exploited more frequently and brazenly.

On balance, the prospects for improved, more subtle "RP" enforcement along the lines indicated are good, provided that proper leadership were established at the antitrust agencies (primarily the FTC). The main problem, unfortunately, is the fact that current leadership at these agencies doesn't really want this kind of effort. Too many of their present leaders have the unrealistic, ideological zeal of the more extreme Chicago School, and a naive faith in the ease of free entry into markets that yields little role for serious or worthwhile antitrust law enforcement. Because of their assumption that entry is really easy into most markets they assert there is little real incentive for monopolistic practices, exclusionary tactics, or predatory pricing. Thus, they would like to dismantle, or at least emasculate, the bulk of our accumulated antitrust inheritance, even though this common law tradition was created patiently, pragmatically in a great many cases, economic studies, and reports all over the country.

But the central premise of extreme Chicago School thinking flies in the face of widely understood business realities, and common sense observation. It is contradicted by two generations of good, sound industrial organization economics and a large body of antitrust casework. Entry into many lines of commerce, and many regional markets, is often difficult, costly, with substantial risks for outsiders. The typical firm in most industries has increased very substantially in size over the past two generations, from family farming through retail distribution, from manufacturing to mining, from wildcat oil drilling to massive offshore rigs and giant power plants. Much of this bigness was unavoidable, and simply the result of improved technology and scale economies. But, to some degree, this brings the problems of reduced competition along with increased productivity.

Obviously, though, this need not lead us back to the horse and buggy days, the one man blacksmith shop, or the tiny Mom and Pop store as the dominant methods of industry and commerce. Technical progress, its complications, and oligopolies have earned their place with increased productivity. But the vital point for antitrust policy is this. The blessings of larger scale technology, increased scale economies and entry barriers, enhanced complexity in products and greater product differentiation, mean that oligopolies are more widespread. The more atomistic competition that was dominant in most areas of the economy a century ago is now less influential, and concentrated oligopolies with substantial entry barriers are, in fact, common today. Hence, the dangers of possible anti-competitive conduct, exclusionary practices and to some degree predatory pricing, have increased with time. In other words, the problems of limited competition, giant corporations, and the dangers of exclusionary practices are more serious today than they were 100 years ago, or even 50 years back.

Therefore, we should not revert to a naive, unrealistic ideology that would deny the realities of oligopoly, more limited rivalry, and concentrated markets that occupy much of the economy today. Nor should we weaken the useful, gradually perfected antitrust law traditions of the United States, that have helped us cope with the risks and dangers of bigness. We cannot hope to abolish bigness, nor should we try. But we must continue healthy antitrust discipline, which includes some kind of effective rule against anti-competitive price discrimination.

The gradually perfected, honed back, more moderate and balanced "RP" law of the later 1960's and early 1970's was a good, sound product of legal development. It largely met the test of "workable competition," i.e., that no stronger substitute or major improvement was available. With more subtle, skillfully selected enforcement against excessive secondary line discount pressures, "RP", as thus modified, would meet this test for the 1980's.

The major requirement for sound "RP", and price discrimination policy is that we restore leadership to the antitrust agencies of the tradition represented by mainstream progress over the last 45–50 years. Hopefully, this can be achieved, at least within a few years.

This remark is not intended to be partisan. Both major political parties in modern times have had Presidents, Attorney Generals, and other appointees with strong antitrust records. Theodore Roosevelt, Thurman Arnold, Bob Bicks, Earl Kintner, Robert Kennedy, Tom Clark and many others have made strong contributions, along with Emanuel Celler, Estes Kefauver, and Phil Hart. In the long run, either political party would make a grave and foolish mistake if they should neglect small business and a vigorous tradition of anti-trust. Free enterprise cannot survive in the long run without a strong, continuing role for small business, that allows so many Americans the opportunity for self-improvement and success that is part of our heritage. And skillful antitrust policy is essential to nurture and protect that role for small business.

Finally, let me offer a few words of advice about what Congress can do in the next couple of years. This Committee should, if possible, hold more extensive hearings on the antitrust problems and remedies available to smaller business—from exclusionary practices, vertical restraints and price discrimination. Live testimony from many small businessmen would be very helpful, and especially, from those lawyers and economists who have actually litigated on behalf of smaller business in recent years in the courts. In this way, the real story of smaller business in our present market place can be told by those directly involved. Certainly their story deserves a full and fair hearing before this Committee of Congress.

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A CROSSROADS FOR THE ROBINSON-PATMAN ACT

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A CROSSROADS FOR THE ROBINSON-PATMAN ACT

WILLIAM A. LOVETT*

More practicing attorneys have been forced to advise clients about the Robinson-Patman Act (section 2 of the Clayton Act, as amended in 1936)[1] than any other antitrust statute. This controversial rule of law regulates the pricing decisions of all firms that sell commodities within interstate commerce, whether small or large, and regardless of their economic power within relevant markets. The Act attempts to suppress—or at least reduce—all price discrimination which would unreasonably threaten small business competitors. Unlike most other antitrust rules, which are directed mainly against large enterprises (or large combinations of enterprises) enjoying significant market power, the Robinson-Patman Act has been frequently applied against very small manufacturers and sellers of commodities. For this reason even relatively modest business clients often encounter problems in trying to understand and comply with this statute, which explains why more attorneys have been concerned with its interpretation than any other aspect of antitrust law.

Unfortunately, the Robinson-Patman Act (or "R-P" as most antitrusters refer to it) involves the most complicated statutory language; it deals with the most complex range of business behavior; and many consider the Act to be the most poorly drafted provision in the antitrust realm. Therefore, no one should be surprised that its administration has been marked with considerable controversy. What may surprise some practitioners, however, is that Robinson-Patman enforcement has fallen recently into such a crisis of confusion that new "R-P" complaints have dwindled to a record low level. A generation of criticism by lawyers, businessmen, and legal and economic scholars, combined with internal disagreements within its principal enforcement agency (the Federal Trade Commission), have culminated in a baffling impasse over the standards for illegality and the direction of future "R-P" policy.

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[1] Robinson-Patman Act, ch. 592, §§ 1-4, 49 Stat. 1526 (1936), *amending* Clayton Act § 2, ch. 323, § 2, 38 Stat. 730 (1914) (codified at 15 U.S.C. §§ 13, 13a-c, 21a (1964)). Robinson-Patman was slightly amended by Act of May 26, 1938, Pub. L. No. 75-550, 52 Stat. 446.

In this debate three major positions have emerged: (i) One faction is convinced that the Robinson-Patman Act should simply be repealed; this would leave the problem of anti-competitive price discrimination to be handled under sections 1 and 2 of the Sherman Act[2] (as "restraints of trade" and "attempts to monopolize") or section 5 of the Federal Trade Commission Act[3] (as "unfair trade practices").[4] Such critics contend that the dangers to competition from price discrimination have been greatly exaggerated and that the enforcement effort has largely been devoted to "protecting competitors" at the expense of competition. In their view, most "R-P" cases have actually encouraged price uniformity and thus have facilitated cartelized agreements for "umbrella" pricing, *i.e.*, artificially high price levels designed to protect less efficient competitors, such as small retailers in the grocery, drug, and automobile service station industries. Furthermore, the attempt to discourage price discounts in the marketplace seriously inhibits healthy pressures for bargain hunting and price competition. (ii) A second faction would like to continue the stringent, "hard line" enforcement policy implicit in the older Robinson-Patman Act cases.[5] To these traditionalists there still exists a substantial threat to competition from predatory price cutting and deep discounts; and small businessmen threatened by such tactics need a more effective remedy, with a much more limited prima facie burden of proof, than either the Sherman or the FTC Acts would allow. This faction refuses to concede that "R-P" actually discourages price competition, insisting that the statutory defenses are sufficient to obviate this danger. Even if there were some enforcement "overkill," the traditional enforcement view has been that Congress has resolved whatever doubts may exist in favor of stringent, "literal" enforcement. (iii) The third faction believes that the Robinson-Patman Act is probably a useful statute which complements other antitrust rules but prefers to "liberalize" it—by either interpretation or amendment—and require a greater showing of competitive injury in most price discrimination cases.[6] This camp concedes the validity of most criticism, *i.e.*, that enforcement has too often encouraged price uniformity and discouraged price competition. On the other hand, this group believes the Sherman and FTC Acts alone would not be adequate to deal with the threats to competition from predatory pricing by firms with market power and from deep discounts in favor of large buyers. Therefore, a more sophisticated administration of "R-P" is needed to discriminate between procompetitive and anti-competitive price discrimination. In their view, the best solution would be to increase somewhat the prima facie burden of proof required in price discrimination cases; this would not appreciably dilute the desired enforcement impact but would largely eliminate the dangers of enforcement "overkill" and unintended, anti-competitive consequences.

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[2] Sherman Act §§ 1, 2, 15 U.S.C. §§ 1, 2 (1964).

[3] FTC Act § 5, 15 U.S.C. § 45 (1964).

[4] Many economists and antitrust lawyers share this view—particularly those who view any ambitious intervention to regulate market activity with deep skepticism and tend to think that market imperfections and deficiencies in competition have been greatly overstated by those favoring the Robinson-Patman Act. Economists taking this position, at least with respect to "R-P" policy, would probably include George Stigler, Morris Adelman, John McGee, and Thomas Moore. Among private antitrust lawyers, opposition to the Robinson-Patman Act is widespread though far from overwhelming; and even within the ranks of the Antitrust Division of the Justice Department there is considerable skepticism as to the theory and practice of "R-P" enforcement, albeit some of this could be dismissed as parochial interagency rivalry. Finally, the recent criticism of the FTC in the report of the American Bar Association's Committee to Study the FTC, published in September, 1969, reflects a disrespect for the FTC derived from its Robinson-Patman enforcement record, as well as certain deficiencies in its consumer protection efforts. For a harsh criticism and a suggestion that it might be better to abolish this agency, see the dissent of Richard Posner (a former law clerk to FTC Commissioner Philip Elman and now a teacher at the Chicago Law School).

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[5] Recent leaders of this "traditional" FTC enforcement effort include Paul Rand Dixon, FTC Chairman between 1961-69 and a long time Commission staff attorney; and Everett McIntyre, an FTC Commissioner since 1961 and a member of its legal staff for most of his professional career. Among academic commentators, one might include Daniel Baum. *See* D. Baum, The Robinson-Patman Act (1964). Wright Patman himself must not be omitted from this listing in view of his continued support for strict enforcement of the Act. *See* W. Patman, Complete Guide to the Robinson-Patman Act (1963). This view is also reflected in leading early cases, such as Samuel H. Moss, Inc. v. FTC, 148 F.2d 378 (2d Cir.), *cert. denied*, 326 U.S. 734 (1945), and FTC v. Morton Salt Co., 334 U.S. 37 (1948).

[6] Leaders of this middle view include two of the recent commissioners, Philip Elman and Mary Gardner Jones, plus a considerable number of academic critics of FTC enforcement policy. *See* C. Kaysen & D. Turner, Antitrust Policy 179-88 (1959) [hereinafter cited as Kaysen & Turner]; J. Dirlam & A. Kahn, Fair Competition 202-58 (1954) [hereinafter cited as Dirlam & Kahn]. Within this camp there is some disagreement as to whether the Robinson-Patman Act requires an overhaul by amendment or mere interpretation by the FTC itself and the courts; Elman, Kaysen, and Turner, for example, contend that statutory revision would be more appropriate.

This article analyzes the current debate over Robinson-Patman policy in considerable detail and suggests how a "more economic" enforcement of this act would promote competition and industrial efficiency, yet would serve to foster small and medium-sized business enterprise. Current legal standards for proof of competitive injury and related defenses are appraised with a view to ensuring that greater competitive benefits flow from enforcement efforts and that the risks of harm to competition and economic efficiency are reduced. Then some administrative implications of a "more economic" approach to price discrimination are outlined, both for the federal antitrust agencies and for private plaintiff's and defendant's counsel.

PRICE DISCRIMINATION AND THE PROBLEM OF ITS REGULATION

A necessary preliminary to analyzing the effects of price discrimination is a more precise, formal definition of this phenomenon. In a narrow economic sense, price discrimination is conventionally defined as follows: the selling (or buying) of homogeneous goods or services, under similar market conditions, to different buyers (or sellers) at different prices or terms of sale, where the net price differential is not proportional to cost differentials incurred in serving these different buyers (or sellers).[7] In a broader economic sense, price discrimination might also be defined to include sales (or purchases) of nonhomogeneous but related lines of products to different buyers (or sellers) at different rates of return on investment. Thus, for example, sales of the same automobile or appliance —or the same grade of fresh produce—to different customers at different prices would be price discrimination in the narrow sense; while sales of a range of related models—or different grades of fresh produce—(running from "high to low" in quality) at prices yielding different rates of return would also be price discrimination, but in the broader sense.[8]

How is it possible to impose different prices or rates of return for similar (or related) goods and services? In perfectly competitive, ideal markets, in which all buyers are perfectly informed and enjoy perfect (cost-free) mobility, it would be impossible to charge different prices simultaneously for the same thing.[9] Each seller and buyer would insist upon the current, "going" market price, and uniform prices would be the inevitable result at any given time. But such market perfection is rarely approximated in real life; infrequent examples are the organized stock and commodity exchanges. Within such exchanges many traders in the same stocks or commodities normally operate from a single post or area on the exchange floor, and trading occurs instantaneously in view of all the traders. In most real markets, however, knowledge is imperfect and unevenly distributed, and mobility may be substantially restricted. In addition, great discrepancies in buying power may exist among competing buyers (and to a lesser extent in strength of good will and other resources among sellers) which enhance the potential for discriminatory treatment. Such market imperfections occur quite often and allow customers to be treated differently. Therefore, competition among buyers (or suppliers) is often defective, and different prices may then be imposed through individual bargaining, *i.e.*, "haggling," or by establishing different classes of customers. Since most participants in the marketplace are eager to maximize their rates of return and obtain the most favorable pattern of prices, they will normally exploit these weaknesses and attempt—if possible—to charge or impose "whatever the traffic will bear."[10]

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[7] *See* F. Machlup, *Characteristics and Types of Price Discrimination,* in Business Concentration and Price Policy 397-435 (1955) [hereinafter cited as Machlup], for the most insightful analysis of different types of price discrimination and the problem of its definition. *See also* Kaysen & Turner 179-80.

[8] Machlup argues most persuasively that both the narrow and broader definitions of price discrimination should be employed in analyzing public policy in this area. Machlup 428-35.

[9] This is conventional economic analysis. *See, e.g.,* Machlup 397-400; Kaysen & Turner 179-80; Dirlam & Kahn 202-03, 208-10.

The systematic survival of significant price discrimination against those buyers (or suppliers) with weaker bargaining power, inadequate knowledge, or restricted mobility will then depend upon some weakness of competition among participants within the discriminating market. Because successful price discrimination will yield greater rates of return in exploiting those discriminated against, the forces of competition could ordinarily be expected to attract new entry into these more profitable activities. But whenever new entry into these higher priced activities is relatively difficult, costly, or otherwise restricted by law or cartel agreement, then the firms presently benefiting from a pattern of price discrimination may agree, if it is in their mutual interest, to continue this profitable pricing strategy—at the expense of those weak in knowledge, mobility, or bargaining power.[11] Since many industries and markets are in fact afflicted with significant entry barriers or other limitations upon competition, it is clear that systematic price discrimination could persist in an important share of the economy. In conclusion, the persistence of price discrimination represents a dual failure of "competitiveness": (i) a lack of knowledge or mobility of buyers (or suppliers) which renders them vulnerable to differential treatment; and (ii) a lack of competition among those who could profit from exploiting this vulnerability.

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[10] The degree to which any market participant can impose the most favorable prices in his bargaining will depend upon the relative balance of knowledge, skill, and competitive discipline affecting each seller-buyer relationship. In the most extreme situations, at least in economic theory, a "perfectly" discriminating monopolistic seller (or monopsonistic buyer) would be able to impose upon each buyer (or seller) the maximum (or minimum) acceptable level of prices. Economic theorists often remark that a perfectly discriminating monopolist (or monopsonist) will segment the market demand (or supply) curve so that each opposing bargainer would only occupy a point or a very limited portion of this market demand (or supply) curve. Thus, the "perfectly discriminating monopolist (or monopsonist)" reaps all of the potential for consumer's (or producer's) surplus himself. (For two recent explications of Alfred Marshall's concept, see G. Stigler, The Theory of Price 78-81 (3d ed. 1966), and W.S. Vickrey, Microstatics 66-76 (1964).)

However, this ultimate degree of bargaining imbalance is very rarely attained in practice, since perfect monopolies (or monopsonies) are quite uncommon and even where they do exist, the opposing side of a market is seldom so much weaker in effective bargaining strength. In real life, however, participants in a highly concentrated oligopolistic market can often impose a substantial degree of market segmentation and price discrimination upon some of their opposing bargainers. In addition, even in the more competitively structured markets, it is sometimes possible for sellers (or buyers) to impose discriminatory prices upon certain classes of relatively ignorant or immobile market participants; for example, systematic price discrimination frequently occurred in many southern communities against unsophisticated Negroes, either as buyers of goods or sellers of labor, within relatively competitive markets, at least in the recent past.

Public Policy Responses to Price Discrimination

But what is the public interest in such price discrimination? At least superficially, there might seem to be an element of unfairness in price discrimination, especially in the more extreme cases of ignorance or restricted mobility. Certainly the disfavored are likely to feel unfairly treated as compared to those favored by lower prices; and they often contend that some protection of small businessmen, and perhaps even consumers, against the rigors of discrimination is essential. Yet those favored by lower prices might often reply that their better treatment had resulted from skill, or just plain "hustle." Furthermore, it might be argued that freedom for bargaining has a certain positive value for society, both intrinsically and for its instrumental effect in promoting a vigorous, competitive economy. Would society be more or less efficient, or enjoy more or less general welfare, if all price discrimination were prohibited and replaced with uniform pricing? Or should society merely prohibit the more extreme or socially obnoxious species of price discrimination? However, if a "discriminating" approach is taken to the problem of reducing price discrimination, by what standards and evidence shall we select the regulated species? And what should be the character of this regulation? These questions are raised here to suggest the awkward difficulties involved in framing a comprehensive public policy towards price discrimination.

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[11] In addition, many industries frequently obtain government regulation or develop cartel arrangements to "institutionalize" and protect profitable patterns of price fixing, as well as price discrimination. But, of course, in the United States the general illegality of cartel agreements (as "restraints of trade") tends to inhibit many of these arrangements by making them difficult to enforce against "price cutters" who fail to observe cartel rules and discipline. Therefore, in the American economy, cartel discipline on price levels and patterns of price discrimination is generally more effective in some of the more governmentally regulated industries, such as intrastate milk marketing, railroad services, some insurance services, and the like. Theoretically, of course, the public interest might be protected against the abuse of cartelized price levels and discriminatory pricing by the supervision of regulatory bodies—but too often these agencies are biased in favor of their industries or simply lack effective leadership or competent staffs. This weakness is especially pronounced at the state level. However, in Western Europe and other areas of the world which still have for the most part "free market" economies, legal restrictions upon cartels are much weaker, industries are often more concentrated, and much worse private cartelization frequently exists. Hence, in the rest of the world informal, nongovernmental cartelization is often a more serious problem than in the United States.

American public policy toward price discrimination presently reflects considerable confusion, but this is probably inevitable in a political system in which conflicting interests reach disorderly and often inconsistent compromises in shaping legislation. At least three distinct and radically different approaches to the problem of price discrimination have been developed in the United States. One response in a few industries has been the detailed regulation of almost all pricing activity by government agencies. Examples are railroad rate regulation by the Interstate Commerce Commission; the regulation of power, gas, and telephone rates by state and federal public utility commissions; and, at least in theory, insurance rate regulation by state insurance commissioners. In such highly regulated sectors of the economy, the public interest in moderating the harshness of private price discrimination is supposedly satisfied by allowing government agencies to supervise the rate schedules. But, of course, this may not eliminate all forms of price discrimination. For instance, railroad rate schedules still charge much lower rates for bulk shipments of low priced commodities, such as wheat or coal, than for high value commodities, such as radios or electronic components. To some degree, railroads have also discriminated on the basis of the distance involved in shipping (even though the long and short haul clause of the Interstate Commerce Commission Act has limited this practice). So long as the established rate schedules are properly supervised, society has been content to accept some degree of price discrimination as preferable to completely uniform rates within these relatively few highly regulated industries.[12]

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[12] Supervising rate schedules is an extremely complex economic policy problem, and it has generated a very large and specialized literature. The greatest experience has been with railroads and competing modes of transportation.

Another approach to the dangers of price discrimination in a few sectors, chiefly labor and agriculture, has been to encourage collective bargaining by labor unions and cooperatives. Part of the rationale behind promoting such collective bargaining is that isolated, individual laborers or farmers frequently suffer great weaknesses in bargaining power, inadequate knowledge, and often limited mobility, which makes them vulnerable to exploitative price discrimination. Therefore, to offset the danger of such abuse, collective bargaining in the form of labor unions and agricultural cooperatives has been encouraged by law to prevent some of the more extreme situations of discriminatory unfairness.[13] Of course, collective bargaining may not eliminate all discrimination in wages or prices, and the unequal bargaining power of different unions or farm co-ops can lead to quite different rates of return on comparable investments of labor or farming resources. However, the countervailing power of such organizations does mitigate many of the harsher situations of imbalanced strength which might otherwise result in severe, exploitative price discrimination against individual farmers or laborers.

Still another approach to price discrimination has been the Robinson-Patman Act; and insofar as most businesses are concerned this is by far the most significant regulation. This statute provides that it shall be unlawful for sellers "to discriminate in price between different purchasers of commodities of like grade and quality . . . in commerce . . . where the effect of such discrimination may be substantially

> [i] to lessen competition or tend to create monopoly in any line of commerce, or
> [ii] to injure, destroy, or prevent competition
> [a] with any person who either grants or knowingly receives the benefit of such discrimination, or
> [b] with customers of either of them . . . ."[14]

The Act also makes it unlawful for buyers "knowingly to induce or

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As Joel Dirlam and Alfred Kahn once observed, "[a] large part of the administration of the Interstate Commerce Act has involved the continued compromise between economic principles (often extremely difficult both to formulate and apply to rate problems) and the rights of established markets, ports, and shippers." Dirlam & Kahn 210 n.12. For a classic introduction to these problems, see D.P. Locklin, Economics of Transportation 289-315 (5th ed. 1960).

[13] The first major steps in this policy were exemption of labor unions and agricultural cooperatives from most of the antitrust laws. Clayton Act § 6, 15 U.S.C. § 17 (1964); Capper-Volstead Act, 7 U.S.C. § 291 (1964). Eventually labor unions, farm co-ops, and, to a more limited degree, consumer co-ops and credit unions became the subject of more explicit statutory encouragement. And particularly in the case of labor unions, with the Wagner and Taft-Hartley Acts and the NLRB, a highly specialized system of governmental regulation has been developed.

[14] Clayton Act § 2(a), 15 U.S.C. § 13(a) (1964) (brackets added).

receive" such discrimination.[15] Furthermore, it proscribes price discrimination employing certain subterfuges—in particular, the payment or receipt of "brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered . . . ,"[16] and the payment or provision of advertising allowances or other services on other than "proportionally equal terms to all other customers competing in the distribution of such products or commodities."[17] Where sellers' conduct is involved, prima facie proof of a Robinson-Patman violation consists of two elements: the requisite class of price differentials and sufficient competitive injury. For buyers' conduct to be unlawful, an additional element is required: "knowingly" receiving or inducing the discrimination.

This statutory scheme falls far short of a total prohibition of all forms of price discrimination. In the first place, it is primarily sellers' price discrimination that is restricted; discrimination by buyers is largely unregulated except insofar as it can be proven that it leads "knowingly" to illegal seller discrimination. Next, because only price discrimination involving homogeneous "commodities of like grade and quality" is prohibited, price discrimination involving merely sales of services (not commodities) remains unregulated; this also leaves unregulated price discrimination in the broader sense, *i.e.*, involving different rates of return within groups of related commodities. In addition, and very important as a built-in means of preventing excessive enforcement, it must be proven that some measure of anti-competitive injury resulted from the acts of price discrimination.[18]

As a further limitation upon enforcement, the Robinson-Patman Act provides three affirmative defenses that can immunize a pattern of price discrimination that would otherwise be prima facie unlawful. The first of these defenses is "meeting competition"; *i.e.*, "nothing . . . shall prevent a . . . showing that [lower prices were offered] in good faith to meet an equally low price of a competitor . . . ."[19] The second is "cost justification"; *i.e.*, "nothing . . . shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are . . . sold or delivered . . . ."[20] The third is "distress selling"; *i.e.*, "nothing . . . shall prevent price changes . . . [in] response to changing [market] conditions . . . such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned."[21] If a price discriminator can establish any one or more of these defenses, liability under the Act will be defeated.

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[15] Clayton Act § 2(f), 15 U.S.C. § 13(f) (1964).

[16] Clayton Act § 2(c), 15 U.S.C. § 13(c) (1964).

[17] Clayton Act §§ 2(d), (e), 15 U.S.C. §§ 13(d), (e) (1964).

[18] It should also be noted that the Robinson-Patman Act is only concerned directly with protecting businessmen and competitors from the impact of price discrimination. The only benefits which consumers receive are indirect, *i.e.*, the advantages of a more competitive, efficient, and productive society. Discrimination by retailers against consumers, except for the few special cases of regulated markets, is not restricted by law. Conceivably, "consumer protection" enthusiasts might seek more regulation of discrimination against consumers by businessmen, but the administrative problems would swell considerably in such endeavors.

[19] Clayton Act § 2(b), 15 U.S.C. § 13(b) (1964).

Finally, there is an interesting statutory link between the Robinson-Patman Act and the policy of promoting collective bargaining for weaker units in the marketplace. It is specified that "[n]othing [in this Act] shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association."[22] And by subsequent amendment, a special class of buyers was exempted entirely from the statute's restrictions—*i.e.*, "schools, colleges, universities, public libraries, churches, hospitals and charitable institutions not operated for profit."[23] These provisions suggest that cooperative buying groups for small businesses and consumers, together with nonprofit institutions, may be intended to serve a collateral function in mobilizing economic power to obtain discounts approaching or equal to those that large commercial buyers can obtain.

Controversies Over The Robinson-Patman Act

To many economists and lawyers this statutory framework represents a somewhat illogical and incomplete approach to the regulation of price discrimination. Among the chief criticisms of the Robinson-Patman Act and its enforcement are the following:

(i) Many contend that the "R-P" proscribed danger zone, price "differences" involving "commodities of like grade and quality," is too narrowly drawn, since serious anti-competitive consequences from price discrimination could occur outside this area: (a) within merely service industries, (b) among groups of related commodities, or (c) where prices are actually identical but offered simultaneously to different layers in the sequence of distribution.[24] These critics generally assert that it would have made more sense to restrict any form of price discrimination in the economy—with the exception of a few highly regulated industries and the labor market, which is now subject to special regulation governing "unfair labor practices." However, it should be kept in mind that bold interpretations for "restraints of trade" under the Sherman Act and "unfair trade practices" under the FTC Act can be employed, in some degree at least, to close these statutory gaps in the Robinson-Patman Act.[25]

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[20] Clayton Act § 2(a), 15 U.S.C. § 13(a) (1964).

[21] *Id.*

[22] Clayton Act § 2, 15 U.S.C. § 13b (1964).

[23] Clayton Act § 2, 15 U.S.C. § 13c (1964).

[24] *See, e.g.*, Kaysen & Turner 183-85. For some commentary on more minor blemishes in statutory draftsmanship, see Levi, *The Robinson-Patman Act—Is it in the Public Interest?*, 1 ABA Antitrust Section 60, 61 (1952).

(ii) To some the defense of meeting competition involves the danger of "buck-passing" and diluted enforcement effectiveness. Since companies can arrange their pricing records in such a way as to indicate every discount was apparently made in response to some salesman's determination that "competition" forced a lower price concession, they can make a strong showing that every discount was properly made to "meet competition." Although larger companies have sometimes avoided liability with this procedure, the danger has been mitigated by a line of interpretative cases holding that a concerted pattern of price discrimination within a relevant market cannot be excused by each participant's claim that it had met competition.[26] Nonetheless, plaintiff's counsel must make a much greater investigative and evidentiary effort in such situations to establish sufficiently a pattern of discrimination which will overcome salesmen's records indicating that "competition" motivated the relevant price discrimination. On the other hand, counsel for many larger firms object that this line of cases makes it difficult for large firms to avoid responsibility for pricing behavior that is really well beyond their individual control; and hence they complain that the meeting competition defense has been unduly weakened in practice.

(iii) To many the defense of cost justification also suffers a serious weakness: it does not allow enough opportunity to demonstrate that socially desirable efficiency gains really justified particular discounts. There are two separate and independent strains of criticism. The first concerns the FTC's stringent evidentiary requirements for proof of cost justification, *i.e.*, it must be detailed and reasonably contemporary to any discounts granted. These critics complain that company records are seldom adequate to meet these strict requirements even when such justification could easily have been made—if only there had been sufficient warning and extra investment in more complete accounting. Therefore, in their view, enforcement policy has encouraged price uniformity well beyond its proper limits and has thereby inhibited firms from achieving optimal efficiency.

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[25] Sections 1 and 2 Sherman Act ("restraint of trade" and "attempt to monopolize") and section 5 FTC Act ("unfair methods of competition") have already been employed to challenge anti-competitive conduct involving price discrimination; but the level of proof required under these statutes would be substantially greater than under the Robinson-Patman Act.

[26] *E.g.*, FTC v. A.E. Staley Mfg. Co., 324 U.S. 746 (1945) (considered the leading case on this point). *See* Rowe, *The Federal Trade Commission's Administration of the Anti-Price Discrimination Law*, 64 Colum. L. Rev. 415, 422-24 (1964), for further analysis and citation of the relevant authority.

The second strain of criticism is more fundamental, *i.e.*, that discounts based upon marginal costs should be allowed in addition to those based upon average total costs. (Court decisions interpreting the Act have uniformly held that only "fully distributed," or average total, costs are acceptable for a cost justification defense.[27]) The choice between these interpretations of "cost" makes a crucial difference in defining the permissible scope for legitimate discounting. If marginal cost justifications are allowed, sellers could simply cover their fixed expenses by charging higher prices to their smaller, weaker customers and meanwhile reduce their prices to cover only the short run marginal or variable costs for the larger, more powerful buyers.[28] Obviously, marginal cost discount-

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[27] *E.g.*, United States v. Borden, 370 U.S. 460 (1962) (probably the most useful precedent on cost justification). In addition, for a very clear and readable exposition of how defendants must handle cost justification from an accounting standpoint, see Lynn, *Is the Cost Defense Workable?*, 29 J. Marketing 37 (January 1965).

[28] Marginal cost pricing can be conveniently illustrated with the following problem involving a small cannery. Every year this cannery operates for ten months with a skeleton processing staff and only minimal overhead for supervisory, office, maintenance, and sales efforts. Annual "fixed" costs amount to $100,000 in the "wage bill" plus $20,000 of amortized capital costs. However, in the two months of the canning season, "variable" costs are a simple function of the volume of crop purchased and sold—with extra labor and cans available at constant prices. (Since this firm is small in its region, it can expand operations without experiencing any change in "variable" costs per unit.) Depending upon the volume of cans sold, costs per unit will range as follows:

Alternative Volumes of Output	Fixed Costs per Unit	Variable Costs per Unit
120,000	$1.00	$ .10
480,000	$ .25	$ .10
1,200,000	$ .10	$ .10
2,400,000	$ .05	$ .10

Assume that ten well-established, traditional wholesaler accounts will allow an annual, aggregate sales volume of 1,200,000 at $.25 per can, yielding $300,000 revenue, with $120,000 of fixed expenses and $120,000 of variable expense. Therefore, a profit of $60,000 will result.

Now let us suppose that Giant Chain Store Corp. offers our cannery an order for an extra 1,200,000 cans, but only if we concede a 40 percent discount, *i.e.*, charge only $.15 per can. Additional "marginal" revenue would be $180,000, but "marginal" costs are only $120,000. Extra profits of $60,000 would result. Hence, our small cannery, by giving in to the "nasty" chain's discount bargaining power, has doubled its profit from $60,000 to $120,000. Obviously, then, many firms will gladly concede discounts to large buyers in order to greatly increase their sales (and profits).

Our small cannery in this case would not have accepted the chain store's ing would offer more opportunity under the law for favoring large buyers. Advocates of allowing marginal cost justifications are usually economists who believe in the maxim of economic theory that marginal cost pricing is a welfare ideal. Such economists contend that sellers should be allowed discretion to use marginal cost pricing whenever they consider it profitable and in their own interest, since little or no external harm results from this kind of discounting. Even if some smaller firms should be forced out of the market by lack of access to deep discounts justified by marginal costs, they claim that resources would quickly flow back into these markets in the form of new entry whenever the surviving large firms attempted to increase profit margins beyond normal, competitive levels. Furthermore, these marginalists argue that deep discounts to large buyers are a proper reward for organizational innovation; and rather than cut off the opportunity for such rewards, they suggest that small firms should be allowed to reply in kind with collective bargaining—*i.e.*, buying groups, such as the Independent Grocer's Association—and perhaps some mergers. In this way, any short run dangers to the survival of healthy small businesses could be largely eliminated.

However, in response to these marginalists, the proponents of allowing only average cost justifications insist that the present interpretation is absolutely necessary to save small business buyers from the competitively disastrous effects of sustained, deep discounts in favor of their large buyer rivals. To allow marginal costs as a defense would place almost any discount within the range of presumptive reasonability and could emasculate Robinson-Patman enforcement efforts. Average cost adherents also contend that large scale re-entry into markets by small firms is no longer easy or

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discount proposal if it had reasoned solely in terms of average cost at the 1,200,000 level of output; at that scale of operations average cost was $.20 per can, and the new chain contract price is only $.15 per can. But by analyzing the revenue of the additional output and its profitability in terms of "marginal" cost, the cannery correctly realizes that by accepting the chain store's offer it can double its profits.

Such "marginal cost" pricing techniques are often profitable for sellers and they are even more so if the discount were not so large in percentage terms. However, this means that large buyers will consistently gain a great competitive advantage over those small buyers who lack the bargaining power to force prices down in this fashion. However, it should be emphasized that small canneries of this type—with such very low marginal costs—are not entirely representative of manufacturing generally. The cost structure of many firms would not involve such low marginal costs and would not afford the opportunity for such dramatic increases in profitability by discount concessions on large orders. Furthermore, there is a danger for those conceding the discounts that nonfavored customers may discover such discounts and demand more or less similar treatment. Of course, those economists who would like to allow marginal cost pricing welcome such "generalization" of discount pressures to achieve lower prices.

likely and that to allow wholesale consolidations of smaller firms as a defense to the discount pressure from large buyers would yield irreversible anti-competitive effects in the form of higher levels of market concentration and more difficult entry barriers within many industries. It is sometimes added that existing small businesses should enjoy a quasi property right of survival and that such entities deserve to be protected against unfair and discriminatory pricing practices. Furthermore, men of the "average cost" school contend that large firms with disproportionate bargaining power do not deserve the windfall gain that follows from being treated systematically as the lower marginal cost buyers, instead of the higher marginal cost buyers.[29] In their view, these concessions by sellers to the clout of big buyers—whether single firms or collections of small firms—do not generate enough social efficiency to justify their anti-competitive consequences. In other words, the maxim that marginal cost pricing yields optimal welfare is challenged, because this "rule" does not sufficiently take into account some long run anti-competitive repercussions and the injustice of excessive gains resulting from accumulations of buyer bargaining power.

(iv) Perhaps the most important controversy over the Robinson-Patman Act centers on the standards of proof for competitive injury, *i.e.*, determining the quantum of evidence required for a prima facie showing of illegal price discrimination. Although questions of competitive impact are also involved in determining the scope for the defenses of cost justification and meeting competition, the most direct method of adjusting the harshness of enforcement policy would be to regulate these prima facie proof requirements. Most critics of the Act, or at least its administration by the Federal Trade Commission, argue that these proof requirements have been too lenient. In their view, both the pressure for discounts from buyers and the opportunity for sellers to chisel against each other with discounts to selected customers are highly desirable for healthy competition. In other words, price discrimination is seen as a two-edged sword which cuts at least as much, if not more, in the direction of healthy competition, as it does in the direction of weakening competition by endangering small competitors. Therefore, to these critics the standards of proof for competitive injury should be made more demanding to avoid the dangers of "R-P" enforcement overkill. Conversely, while many adherents of the Commission's strict enforcement policy concede the two-edged character of price discrimination, they insist that any return to unrestricted discriminatory practices would cut overwhelmingly against competition; they maintain that there is little leeway within which to lessen the requirements for proof of competitive injury, because the opportunities for statutory evasion expand tremendously once the FTC departs from a very strict, prophylactic policy of challenging any discounts not justifiable in terms of average total costs. In short, the FTC's traditional "R-P" enforcers insist that our choice is restricted to either (a) holding the present line or (b) caving in entirely and allowing unwarranted and excessive injury to competition.

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[29] Generally it is the larger buyers who are treated as the lower marginal cost buyers. Of course, this marginal cost pricing strategy would be profitable to sellers, for it is the confidence of large and long term contracts that justifies the extra investment of seller working capital. Sellers forced to make continuing sales efforts in dealing with many small volume purchasers are often much less confident about reaching their largest potential sales volume than they would be when a few very large orders from big buyers can be relied upon.

Solving the Problem of Statutory Interpretation

Since the statutory language and legislative history of the Robinson-Patman Act (and its predecessor, the original section 2 Clayton Act) allow considerable latitude for interpreting both the standards for competitive injury and the defenses of meeting competition and cost justification, it is possible to resolve most of the foregoing controversies—one way or the other—through the process of case-by-case construction. Even those difficulties caused by an unduly narrow scope or subject matter in this Act can be largely resolved, as previously indicated, by a liberal use of sections 1 and 2 Sherman Act and section 5 FTC Act as complementary remedies. The problem then becomes one of finding appropriate guidance in this work of statutory interpretation.

What principles should govern in our effort to make the best possible sense out of the Robinson-Patman Act? Two main approaches have been offered. The first emphasizes a protectionist philosophy, designed to preserve as many as possible of the smaller retailers, wholesalers, and other small business units within our free enterprise system. The objective of this approach is as much promoting political and social ends as encouraging competition to achieve economic efficiency.[30] The second approach places primary emphasis upon the promotion of competition and efficiency—and is not particularly concerned with maintaining the smallest-scale business units if they can no longer efficiently survive in the marketplace.[31] The margin of difference between these two approaches might easily be exaggerated, however. For example, adherents of the first view concede little loss of efficiency or competition in their effort to protect small business, while adherents of the second often doubt that much social transformation away from small business need really be feared. Furthermore, it is possible to blend the two approaches—by protecting small business only to the extent efficiency and competition are fostered, or at least maintained. Nonetheless, the more extreme interpretations can very drastically influence prima facie standards for competitive injury and the defenses of meeting competition and cost justification. Crucial differences emerge in the risks that the opposing schools of thought are willing to take in the enforcement process: (i) endangering some small business survival through a failure to inhibit price discrimination, or (ii) risking some inhibition of healthy competitive pressures for efficiency by severe restrictions upon bargaining freedom. These risk estimates depend, of course, upon different diagnoses of the competitive environment. The most extreme critics of "R-P" administration and the protectionist philosophy believe that competition in the marketplace is basically strong and healthy and needs little government assistance in the form of antitrust restrictions. On the contrary, the most extreme FTC protectionists are convinced that many industries and markets would be ripe for rapid monopolization if "R-P" is not enforced vigorously and harshly.

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[30] The view of most "R-P" critics is that this protectionist philosophy degenerates in practice to "protecting competitors at the expense of competition." However, in the long run, a strong, healthy supply of small businesses plays a very important social function in helping to maintain the morale, entrepreneurship, and social mobility of a free, private enterprise society. The question is then: How much protection (and at what cost in efficiency) should society invest in the "protecting" of small business?

Certain aspects of the legislative history can be cited to support either extreme of interpretation as the intent of Congress in this matter. On the side of the protectionists, for example, it is manifest that most of the real political momentum behind the Robinson-Patman Act came in the mid-1930's from a narrow sector of anti-chain store interests. These were wholesalers, brokers, and retailers from the grocery and drug industries, who could then be found in significant numbers within almost all congressional districts. When the National Recovery Administration and its codes restricting chain store discounts were declared unconstitutional in *Schechter Poultry Corp. v. United States*[32] in 1935, Rep. Wright Patman promptly introduced a bill drafted by H.B. Teagarden, who was then counsel for the United States Wholesale Grocer's Association. This bill went considerably beyond earlier FTC complaints about the inadequacies of the original section 2 Clayton Act and was tailored to meet the needs of the foregoing interest groups.[33] A further indication of the special character of this legislation is Rep. Emanuel Celler's minority report, which strongly criticized the victimization of the consumer in favor of these interests.[34] Nevertheless, the legislative history reveals no intention on the part of the majority to protect small retailers and wholesalers at the expense of competition or economic efficiency. Quite the contrary, both the Senate and House Committee reports emphasized that this new legislation would serve to promote competition and economic efficiency; and the House Committee report (which sponsored most of the final text) went on specifically to stress that:

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[31] An apt expression of this point of view is the following remark by John McGee:

> [C]ompetition is a process thought to be more probable within some industrial structures than others. In another sense, it is a set of allocative performance standards. But in no useful sense is competition a cast of characters. If one or many farmers fail or die of plague, competition [in farming] is not reduced.

McGee, *Some Economic Issues in Robinson-Patman Land*, 30 Law & Contemp. Prob. 530, 548 (1965).

Nonetheless, the protection of many small businessmen, even farmers, has often been justified on political and social grounds not directly related to competition and economic efficiency. (Of course, advocates of such protection usually insist there are some indirect efficiency gains—in improved social morale, mobility, and entrepreneurship.) Again, we must ask: how much, if any, sacrifice, in the long run, of net efficiency should society invest in "protection" for small business? And how much of a reduction in the cost of this "subsidy for smallness" would result from the indirect efficiency gains from preserved social morale, mobility, and small business entrepreneurship?

> There is nothing in [this bill] to penalize, shackle, or discourage efficiency, or to reward inefficiency. There is nothing in it to fix prices, or enable the fixation of prices; nor to limit the freedom of price movements in response to changing market conditions.
>
> Any physical economies that are to be found in mass buying and distribution, whether by corporate chain, voluntary chain, mail-order house, department store, or by the cooperative grouping of producers, wholesalers, retailers, or distributors—and whether those economies are from more orderly processes of manufacture, or from the elimination of unnecessary salesmen, unnecessary travel expense, unnecessary warehousing, unnecessary truck or other forms of delivery, or other such causes—none of them are in the remotest degree disturbed by this bill. Nor does it in any way infringe the seller's freedom to give a part or all of the benefit of the saving so effected to others with whom he deals, whether in higher prices paid to the producer from whom he buys his raw materials, or in higher wages to those who labor in production handling of his goods, or in lower prices to the customer, including the ultimate consumer who buys them.

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[32] 295 U.S. 495 (1935).

[33] *See* F. Rowe, Price Discrimination Under the Robinson-Patman Act 11-23 (1962) [hereinafter cited as Rowe].

[34] H.R. Rep. No. 2287, 74th Cong., 2d Sess., pt. 2, at 5-6 (1936); *see* 80 Cong. Rec. 8109 (1936).

> It is not believed that the restoration of equality of opportunity in business will increase prices to consumers.[35]

An even more dramatic indication of the congressional intent to make this new legislation consistent with a pro-competitive policy is evident from the critical amendments to the original Patman bill substituting the present requirements for competitive injury in place of a more blanket prohibition of price discrimination.[36] Therefore, although the political origin of the Robinson-Patman Act was plainly protectionist, the controlling view among those passing the legislation was clearly that there was to be no conflict between its new requirements and the already well-established public policy of encouraging competition and economic efficiency. We must conclude then that Robinson-Patman standards for competitive injury, meeting competition, and cost justification must be made at least consistent with competition and economic efficiency; and wherever possible we should interpret the Act to promote these objectives.

Having determined that economic considerations of efficiency and competition must play a very strong part in Robinson-Patman interpretation, we then encounter the most perplexing problem in making sense out of this statute: the relevant economic circumstances are usually poorly documented, are often subject to many interpretations, and have generated sharp controversy among the "experts." The problem does not stem from any lack of agreement as to appropriate economic indicators. Most economists would quickly settle for details on relevant (i) market structure (concentration—*i.e.*, the number and size distribution of firms and their market shares—the degree to which entry is difficult or expensive, and the extent of product differentiation); (ii) cost-price relationships (including the average and marginal cost curves of competing firms and the alternative rates of return on investment under different pricing assumptions); and (iii) patterns of pricing rivalry and competitive tactics. Nor is the problem really an inability to agree upon what circumstances—under different factual assumptions—would constitute unacceptable dangers to competition or needless restrictions upon competitive rivalry. The problem is that reliable data is extremely difficult to develop in sufficient quantity, since it would require resources of data collection and economic analysis that go far beyond traditional conceptions of staffing and budgetting for the antitrust agencies. Such data, and particularly the cost and price information, would be very expensive to tabulate, collect, and analyze; and the present illegality of much price discrimination makes unreliable at least some of the documents (such as invoices, etc.) that would be produced under subpoena or statutory process.[37] Unfortunately, the traditional interpretations of the Robinson-Patman Act requiring only a limited burden of proof and the frequent pretrial consent settlements have not encouraged extensive explorations of the relevant facts; thus in many respects, the available decisions, opinions, and transcripts afford little more than some good examples for all protagonists and participants involved in the foregoing Robinson-Patman controversies.[38] How then can a supposedly "expert" administrative agency like the FTC be expected to make sense out of these skimpy facts and the abundant conflict among the available experts? Indeed, this would seem to be a depressing and most frustrating state of affairs.

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[35] H.R. Rep. No. 2287, 74th Cong., 2d Sess. 3 (1936).

[36] *See* Rowe 11-23.

Nonetheless, these issues of legal choice cannot be avoided by relying upon the traditional momentum of previous cases interpreting the Robinson-Patman Act or by simply scrapping the Act altogether and starting with a clean slate. Either approach would beg crucial empirical questions, which can actually be answered to some degree in resolving the present controversy. But the law is often forced to make policy choices regarding the rights and liabilities of parties despite a lack of complete information, which marks one of the great differences between the arts of practical jurisprudence and deliberate social science. Fortunately, however, a certain measure of likelihood can be sifted from the available facts; some reasonable inferences can be made by employing the less controversial inferences from economic theory; and some sensible conclusions as to what would probably be a more rational, efficient, and pro-competitive policy under the Robinson-Patman Act can be reached. What follows is just such an appraisal, offered here in the hope that it will assist the Federal Trade Commission, reviewing courts, and private practitioners engaged in both prosecuting and defending complaints under this Act.

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[37] This task would require far more than merely collecting and comparing list price books and sheets issued by companies, which are frequently expressed in highly technical codes and abbreviations and often lack comparability. Complete inquiry of this sort would also require vast investigative effort to check the prices actually being paid by purchasers and to expose any secret rebates paid to conceal discounts presently illegal under the Robinson-Patman Act.

[38] Relatively few substantial empirical studies have been made of price discrimination cases by economists. They include: (i) J. McGee, The Robinson-Patman Act and Effective Competition, 1952 (unpublished Ph.D. dissertation, Vanderbilt University); (ii) R. Brooks, Jr., The Meaning and Determination of "Injury to Competition under the Robinson-Patman Act," 1959 (unpublished Ph.D. dissertation, University of Chicago); (iii) M. Adelman, A & P: A Study in Price-Cost Behavior and Public Policy (1959); and (iv) C. Edwards, The Price Discrimination Law (1959). In addition, W. A. Lovett, who was primarily responsible for a study of price discrimination and other restraints of trade in the food industry, published part of the results as chapter 5, "Market Conduct," in National Commission on Food Marketing, Technical Study No. 8, Food Manufacturing 149-79 (1966).

The baffling problem encountered by all of these economists is that the decisions and records in Robinson-Patman cases supply surprisingly little evidence upon which to base a confident prediction of pro-competitive or anti-competitive consequences. The reason is simple enough: traditional, minimal standards of proof in "R-P" cases did not require this quantum of evidence. Unfortunately, these skimpy records provide most of the available empirical information on price discrimination in the marketplace—except for a few highly regulated, public utility industries, but which typically have much more sharply declining costs (with increased output) and hence lower marginal costs than is normal in industry.

ENFORCING THE ROBINSON-PATMAN ACT TO ENCOURAGE COMPETITION AND ECONOMIC EFFICIENCY

A more rational administration of the Robinson-Patman Act would (i) increase the burdens of proof for government prosecutors to show competitive injury and (ii) insist that defense counsel still meet a substantial burden of proof to establish their defenses of meeting competition and cost justification.[39] This policy differs not only from that offered by many critics, who would merely increase the burden of proof for the prosecution while easing that of the defendants, but also from the traditional FTC policy, which has attempted to minimize the prosecution's burden of proof and maximize that of the defendants. The basic reason for this change in policy stems from the fact that price discrimination is a two-edged sword in the marketplace, cutting sometimes in the direction of competition and efficiency, and at other times in the opposite direction. To continue reliance upon minimal standards of proof in Robinson-Patman cases would all too frequently leave the real effect of given pricing patterns unresolved; such groping in the dark is senseless and very much in conflict with an efficient and pro-competitive price discrimination policy. This new policy prescription rests upon the assumption that any assessment of the overall competitive impact from price discrimination must remain somewhat tentative, at least until much more factual evidence is available and properly analyzed. At this stage, we cannot afford to accept any extreme diagnosis—*i.e.*, that price discrimination is overwhelmingly pro-competitive or overwhelmingly anti-competitive; the balance of competitive effects should be resolved to a much greater extent in specific industrial situations.

Fortunately, this new approach will not require any tremendous increase in the work and expense of Robinson-Patman enforcement or litigation, provided that sensible economic inferences are used to focus the scope of proper inquiry. Much of the previous difficulty experienced by most attorneys with this Act is that they felt "at sea" in making any broader economic analysis with respect to price discrimination, regardless of whether they worked for the FTC itself or as private counsel for parties plaintiff or defendant.[40] This problem can be solved by implementing the following recommendations relating to: (i) standards of proof for "primary line" injury and related defenses; (ii) standards of proof for "secondary line" injury and related defenses; and (iii) administrative reallocations in FTC staff resources and improved use of economic expertise by private litigants.

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[39] This is also the recent trend in FTC and circuit court decisions in "primary line" price discrimination cases. However, in "secondary line" cases this trend is, at best, just beginning. These matters will be more fully explained in the following pages.

Primary Line Injury and Related Defenses

One traditional distinction between competitive injury in "primary" and "secondary" lines must be made at the outset in analyzing standards of proof under the Robinson-Patman Act. Primary line injury involves a loss of competition within that line of commerce in which the discriminatory sales occur. For example, large discriminating manufacturers who reduce selling prices within only a few territories or product lines in order to ruin—or at least discipline—smaller and localized manufacturers of some product would be creating competitive injury in the primary line. On the other hand, secondary line injury would occur when the competitive impact from discrimination occurs at some other level in the chain of distribution, *i.e.*, among customers or potential customers (or among suppliers or potential suppliers). For example, deep discounts often given by manufacturers to large chain retailers may ruin, or at least greatly disadvantage, small retailers in competition with these chains; a reduction in competition at these other levels would be secondary line injury, because it did not occur at the manufacturing level where the discriminating sales were made. Since each form of discrimination involves different circumstances, indicators of competitive injury, and likelihoods of harm to competition, different burdens of proof have had to be developed in primary and secondary line cases.

There is fairly wide agreement among economists and antitrust lawyers on the long run economic objectives of primary line enforcement. It seeks to prevent "predatory pricing tactics" that would eliminate otherwise viable competition from the marketplace. Given very complete information on market concentration, entry conditions, cost-price patterns, and business intentions, economists could generally agree upon whether pricing behavior in particular cases was predatory or not. The practical problems arise when the information is more limited. In other words, we must define a manageable and not too demanding prima facie burden of proof—which (i) will force government prosecutors and private plaintiffs to mobilize sufficient indications of real competitive injury to minimize unwarranted restrictions upon competitive pricing freedom, (ii) without insisting on so much investigative effort as to preclude prompt and effective relief for significant injuries to competition and related injuries to individual competitors. This is an awkward dilemma, and different responses to it explain the conflicts among leading primary line decisions by the Federal Trade Commission and reviewing courts. Alternative approaches have ranged from the least demanding requirement of a "mere diversion of business" from a competitor to the much more burdensome requirement that a "substantial impairment of competition" in the relevant market be demonstrated.[41] Traditional FTC enforcers, at least until recently, have often tried to get by with the former, while private defense counsel have naturally urged the latter to trial and reviewing courts. The standards most recently applied by the FTC are probably illustrated best by the *Dean Milk Co.*[42] case, a most revealing and difficult split decision (3-2).

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[40] Economic analysis of the competitive repercussions from price discrimination requires somewhat more information and subtlety than most "R-P" litigants have been accustomed to investing in these cases. One really needs reliable data on market structure, price-cost margins, and pricing patterns with different customers in order to make any confident predictions of pro-competitive or anti-competitive consequences.

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[41] The "mere diversion" standard is illustrated by Samuel H. Moss, Inc. v. FTC, 148 F.2d 378 (2d Cir.), *cert. denied*, 326 U.S. 734 (1945); *see* Rowe 151-53 (further citations). The "substantial impairment of competition" standard is illustrated by Anheuser-Busch, Inc. v. FTC, 289 F.2d 835 (7th Cir. 1961); *see* Rowe at 153-63 (further citations). Relatively few cases have been decided subsequently, and probably the only really important new authority is Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967).

Utah Pie Co., a small bakery in Salt Lake City, entered the frozen pie market there in late 1957. Due to the superior marketing strength of its national rivals in the frozen pie market, including Continental Baking, Pet Foods, and Carnation Milk, Utah Pie decided to offer its frozen pies at a discount. These three large, national firms responded by lowering their price levels by more than one-third over several years. Utah Pie then brought a private antitrust action under section 2(a) of the Robinson-Patman Act, alleging a primary line violation. Although the jury found for plaintiff, the Circuit Court of Appeals reversed. Then the Supreme Court reversed the circuit court, holding that evidence sufficient to warrant a finding of competitive injury had been offered at the trial. This evidence—though not as well developed by plaintiff's counsel as it might have been—indicated: (i) a localized, discriminatory pricing pattern in the Salt Lake area; (ii) prices below cost for two of the three large rivals; (iii) placement of an "industrial spy" into the Utah Pie plant by one of these rivals; and (iv) documents suggesting a specific predatory intent on the part of one large rival. While this decision has been sharply criticized by those favoring a stronger burden of proof in "R-P" cases, it illustrates how a somewhat less demanding standard of proof has been applied to small private plaintiffs, as contrasted to government agency (FTC) counsel.

[42] Dean Milk Co., [1965-1967 Transfer Binder] Trade Reg. Rep. ¶ 17,357 (FTC 1965).

Dean Milk was one of the major dairies of the Chicago area and was also active in some other cities in nearby states. In 1952, Dean Milk entered the Louisville, Kentucky, area by acquiring a local dairy; its new competitors comprised the National Dairy Company, the largest marketer of milk products in the nation, and eight other small local dairies. About two years later, Dean Milk began a program of quantity discounts in favor of larger milk buyers in the Louisville area. This lowered the price structure, and sales declined for most of Dean Milk's competitors, both in the home delivery market and in wholesaling to grocery stores. Dean Milk, on the other hand, significantly increased its sales and market share over a number of years. According to the *Dean Milk* majority:

> It is the Commission's opinion that a finding of possible substantial competitive injury on the sellers level is warranted *in the absence of predation* where the evidence shows
>
> [i] significant diversion of business from the discriminator's competitors to the discriminator or
>
> [ii] diminishing profits to competitors resulting either from the diversion of business or from the necessity of meeting the discriminator's lower prices,
>
> *provided that* these immediate actual effects portend either
>
> [a] a financial crippling of those competitors,
>
> [b] a possibility of an anticompetitive concentration of business in large sellers, *or*
>
> [c] a significant reduction in the number of sellers in the market.[43]

Unfortunately, this standard of proof constitutes only a partial retreat from the earlier "mere diversion" test. It might still be possible under this *Dean Milk* doctrine to establish a prima facie violation with no more than a "significant diversion of business," so long as it portended a "financial crippling" of several complaining competitors.

In contrast, the FTC minority in *Dean Milk* would have required a more unambiguous showing that competition in the relevant market had also been endangered. Particularly interesting in this regard is Commissioner Elman's dissent, which offered a carefully phrased, alternative standard of proof:

> A seller violated the statute if, by virtue of operating in a number of geographical markets, he has the power to lower his price in one market while maintaining higher prices elsewhere, and does so in circumstances where, as a matter of reasonable business probability, the effect may be to eliminate, impair or lessen competition substantially, to tend to create a monopoly in any market, to destroy unfairly or cripple other sellers' capacity to compete, to block the entry

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[43] *Id.* at p. 22,530-31 (emphasis and brackets added).

> of new competitors into the market, or to punish, discipline, or intimidate a competitor who has not "held the price line" or has otherwise shown competitive independence.[44]

Elman's formulation still leaves an opportunity to protect individual competitors by limiting price discrimination, but he would require that this protection be implemented only when their individual injury indicated some threat to market competition—*viz.*, the blocking of new competitors, the disciplining of competitors who had not held the price line or had otherwise shown competitive independence, or the unfair destruction or crippling of other sellers' capacity to compete. It must be emphasized, however, that Elman would not require a showing of specific intent to accomplish these ends—which would be a difficult affirmative burden of proof and would unduly shield predatory practices.[45] Commissioner Jones agreed with Elman in *Dean Milk* that this record did not contain sufficient evidence of competitive injury although she chose not to endorse his particular standard of proof. Her opinion reflects a more cautious, case-by-case approach to formulating standards of competitive injury, but she did emphasize the ambiguous character of price discrimination—for example, she remarked that:

> It is just as easy to infer from the record in this case that competition was enhanced by Dean's lower—and discriminatory—prices than that it was injured. Indeed on the present record, I could more easily draw the former inference than the latter.[46]

Miss Jones then suggests that extra evidence should have been developed concerning the longer run competitive consequences of the price war which Dean Milk initiated—in terms of changing market concentration, entry and exit of firms, and the history of prices and profits before and after this price war.

The *Dean Milk* case, and particularly its dissents, are valuable indicators of the likely direction of FTC policy. Even the majority opinion, as Elman correctly emphasized, makes a definite break with the older "mere diversion" standard—under which "competitors" could very easily be protected at the expense of "competition." Also, the voting balance on the Commission seems likely to change permanently in favor of the minority. The terms of the only two members of the *Dean Milk* majority remaining on the FTC, Dixon and McIntyre, will expire within the next several years; the Nixon administration would probably not appoint to the Commission any former FTC staff members—such as Dixon or McIntyre; and Nixon appointees are more likely to be sympathetic to the minority view in *Dean Milk*.[47] Furthermore, it must be stressed that sentiment among the private antitrust bar overwhelmingly favors this newer view and that the strong, anti-chain store attitude prevalent among older FTC attorneys simply no longer exists in any comparable degree among the staff's younger generation. Hence, it would appear that the Commission will abandon the earlier, simplistic test of "mere diversion" in primary line cases and will insist upon some sufficient indication of danger to competition in the marketplace.

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[44] *Id.* at p. 22,559.

[45] Elman explained that:

> There are, to be sure, formidable difficulties in determining within the framework of a single litigation whether a particular course of local price cutting is destructive, or beneficial, or harmless, in its nature and forseeable competitive effect; and to conduct in every case a full inquiry into all aspects of the structure and performance of the firms and markets involved is no more practicable in this than in other areas of antitrust enforcement. But that of course does not justify any and all shortcuts to a finding of violation.

Id. at p. 22,560.

[46] *Id.* at p. 22,569.

However, this means the FTC and the courts must now take up in earnest the more complicated task of specifying what kinds of danger to individual competitors will sufficiently threaten market competition. Certainly the factors suggested by Elman and Jones would be significant ingredients in this new analysis; and certainly the cautious, incremental approach implicit in individual precedents will be part of its forthcoming development. Even at this transitional stage, it is possible and worthwhile to describe in detail how an improved analysis of competitive injury could be implemented in primary line cases. What follows is my own synthesis of the relevant economic and legal literature and the more recent precedents—designed to suggest with greater precision how primary line injury can be conveniently demonstrated.

First of all, much more emphasis must be placed in primary line cases upon developing an historical appraisal of the relevant market structure and the trend of competition within these markets. Of special interest will be any changes in concentration patterns, entry barriers, or product differentiation, plus price-cost margins—both before and after the alleged predatory pricing occurred. This by no means requires a full-blown study in industrial economics for every single section 2(a) Clayton Act investigation, although greater use of such studies, if developed, could help to identify likely problem industries in the economy. A few key facts —such as changing market shares of the leading firms and the sales and profits for smaller, representative firms in the competitive fringe—will still go a long way to indicate whether competitively significant diversions of business are resulting from localized price differences. But a somewhat further development of evidence should be required; for example, a few well-handled field interviews with market participants can reveal what technological changes are at work in the industry—and their cost-price and efficiency implications, which will indicate whether predation or economies of scale and integration are actually driving out the unprofitable, and usually smaller, firms. This extra investigative effort need not significantly increase the cost of investigating and litigating "R-P" cases. Nor will it require that every FTC attorney and private treble damage claimant obtain a Ph.D. in economics.[48] What will be needed is simply the exercise by attorneys of good business judgment and practical imagination, as to whether predation is really affecting some territory or product line, and a little more "hustle" in looking beyond mere price differences and declining sales for a few complaining firms. An appropriate supporting staff of government economists (or consultants for private practitioners) can supply whatever extra economic sophistication may be necessary. (More will be said on this point in the concluding section on administration and staff allocations.)

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[47] This seems a reasonable prediction, since Republican appointees to the FTC have been more often business oriented and private practitioners in the antitrust bar. Dixon and McIntyre were both appointed early in the Democratic administration of President Kennedy. In the long run, of course, it is harder to predict Commission appointees—except to note that (whether right or wrong) a strong, populist bias against large firms and chains is much less prevalent today among younger antitrust lawyers and economists.

Secondly, in analyzing the threat to competition, patterns of market structure are particularly important because economists have demonstrated that they have a high degree of predictive power in revealing the dangers to be feared from predatory pricing.[49] For example, where market structure is relatively competitive— with neither a high concentration nor any significant regional or product line entry barriers—we simply need not fear significant predatory pricing. In such cases sporadic price cuts will generally be desirable and normally reflect healthy price competition, which should not be inhibited by misplaced primary line enforcement efforts. Where smaller firms are engaged in localized area or product line discriminations in price against larger and more diversified firms, this usually is a sign of competitive rivalry—not of competitively dangerous predation at work. Even where strong national firms are engaged in such discrimination against each other, it may be in fact highly desirable price competition—provided this discriminatory pricing does not seem likely to permanently eliminate a significant number of smaller firms and reduce the force of competition within relevant markets as a result. On the other hand, predatory pricing will often be a very real threat when larger firms with "market power," at least in their respective markets, employ localized price cuts against smaller and less diversified rivals.[50] In the latter situations the large firm may often experience sufficient gains from predation to offset the short run costs inevitable in such a predatory price cutting campaign. Obviously, primary line enforcement efforts—and the sympathy of federal district courts hearing private treble damage claims under the Robinson-Patman Act—should be concentrated upon these latter market structures, which really indicate a vulnerability to predation. In fact, the burden of proof for complaints of primary line injury should be adjusted to reflect the likelihood of competitive injury suggested by the relevant market structure. In other words, where a competitive market is involved, much more evidence should be required to show competitive injury from localized, sporadic price differences; but where a relatively concentrated market structure is involved with significant discrepancies in the comparative size of firms and entry is not relatively easy and likely to replace ruined small business, the FTC and the courts should be extremely sensitive to the danger of predatory, localized price cutting by the larger firms and should insist on a much more modest burden of proof to establish competitive injury on behalf of the complaining "victims."[51]

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[48] *See* notes 73-80 *infra* and accompanying text, for a discussion of the administrative implications.

[49] *See, e.g.*, McGee, *Some Economic Issues in Robinson-Patman Land*, 30 Law & Contemp. Prob., 350, 546-49 (1965).

To illustrate how these guidelines should be applied to primary line price discrimination cases, consider the *Dean Milk* situation again and how its factual ambiguities might have been resolved. In this case government counsel demonstrated three things: localized price cuts in the Louisville area by a strong semi-national dairy company (Dean Milk); diversion of business from one large national rival and eight small local rivals; and the prospect of crippling financial losses for at least half of these smaller rivals. But whether these weaker rivals were actually inefficient firms that deserved to fail under lower and more competitive prices or healthy and viable small dairies that were threatened with predatory pricing was left unresolved. Additional evidence should have been developed with respect to: (i) economies of scale or integration, and their impact on the survival of these small dairies; (ii) price-cost margins in the Louisville area before and after the price structure was lowered; and (iii) a comparison of price-cost margins in Chicago (the major home market of Dean Milk) and the Louisville area to disclose any significant differences in regional rates of return. Evidence on these matters could have been developed by testimony of witnesses and documents obtained from Dean Milk and its rivals; ample investigative authority exists in the subpoena power and "special report" provisions of the Federal Trade Commission Act.

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[50] The phrase "market power" is employed here in the technical sense originally stated by Kaysen and Turner, *i.e.*, the ability to impose non-competitive price behavior (either independently, or with a few other firms). *See* Kaysen & Turner, *supra* note 6. *See also* P. Areeda, Antitrust Analysis: Problems, Text, Cases (1967) (a widely used antitrust casebook which has helped to give this phrase wide currency).

[51] *See* note 41 *supra* (specifically the discussion of Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967)).

Implementing these guidelines for investigation and proof of primary line cases would go a very long way towards achieving a more sensible, efficient, and pro-competitive enforcement of the Robinson-Patman Act. But so much for the prima facie burden of proof for complainants. What would these changes in "R-P" imply for proper treatment of the defenses of meeting competition and cost justification? Fortunately, with the implementation of a more demanding prima facie burden of proof for competitive injury in primary line cases—one which takes proper account of the crucial significance of market structure as indicative of the real dangers of injury—the problem of standards for proving "meeting competition" defenses becomes much less important. If plaintiff's counsel (whether government prosecutors or private treble damage claimants) must show that competition may really be impaired by a pattern of localized price discrimination, then we can have confidence that the practice must be stopped in order to protect competition. Much of the previous concern over the risks of unfairly attributing the responsibility for initiating primary line injury stemmed from a lack of confidence that singling out certain parties as responsible was at all justifiable when based upon minimal "mere diversion" standards for injury. In addition, by demanding a more complete analysis of the relevant market structure and price-cost margins, the likelihood of ascertaining which of the firms in a market actually caused the injury will be much greater. Furthermore, chief importance will also be assigned to the larger firms in these markets, since the smaller firms lack the "market power" to inflict primary line injury. Finally, of course, when it is established that competitively dangerous consequences seem likely to result from a localized pattern of price discrimination, the well-established precedents restricting "buck passing" should continue to be followed, and the leading firms in the relevant markets compelled to stop discrimination endangering competition.[52] Larger firms with market power may find it unpleasant to be goaded by unwanted price competition from smaller, sometimes more efficient rivals and to be prevented from swiftly destroying or disciplining these gadflies with predatory responses; but an extra measure of responsibility and care is a necessary consequence of their larger size. In the same way that very large men must be careful in wrestling with little children, the larger firms with market power must exercise responsibility in their pricing policies.

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[52] *See* authority cited note 26 *supra.*

Cost justification defenses present no great problems in primary line cases. Defendants charged with unlawful price discrimination should have a practical, and not merely theoretical, opportunity to present evidence that cost differentials really justified the localized price differences. This will require somewhat more relaxed standards of proof insofar as cost "estimates" are concerned, *i.e.*, they need not necessarily be in tremendous detail or even contemporaneous to the alleged price discrimination as long as they reasonably indicate that differential costs really did justify the pricing patterns involved. On the other hand, a mere claim of "good faith" and an asserted ignorance of anti-competitive consequences cannot be allowed to frustrate prompt, effective relief for significant primary line injuries. However, relatively few of the many successful prosecutions for primary line injury have actually involved cost justification defenses; instead most of the cases involve unambiguous predatory conduct and very often explicit evidence of anti-competitive intent. Hence, cost justification defenses are not likely to play an important role in most primary line cases—especially when greater care is taken to ensure that a real threat to competition is demonstrated by the prosecution or private plaintiffs as part of their prima facie burden of proof. In the minority of cases where defendants might actually be able to explain localized prices by cost differentials, it would be irresponsible for an economically sophisticated Robinson-Patman enforcement policy to insist upon unrealistic and impossible detail in presenting cost justification defenses. The Federal Trade Commission, its hearing examiners, and trial courts need only insist the defendants produce reasonable estimates of the relevant costs which supposedly justified price differences, and they can rely on plaintiff's counsel to point out the inadequacies of these estimates.

Secondary Line Injury and Related Defenses

Secondary line price discrimination cases differ in many important respects from those involving primary line injury; thus, somewhat different standards of proof for competitive injury have had to be developed. Perhaps the most important economic distinction to be drawn is that secondary line discount pressure is commonly pervasive—at least insofar as the larger buyers are concerned—and results in general and long lasting discounts in favor of these larger buyers. In contrast, primary line discrimination occurs in a much more limited proportion of industrial markets—only those involving significant market power in the hands of the predatory discriminators—and only for relatively brief periods of time sufficient to ruin or discipline smaller, localized competitors. This means the investigative problem is fundamentally different in each type of case.

Competitive injury from primary line discrimination is likely to be found in only those market structures in which the discriminators enjoy substantial market strength, and it will involve prompt and usually quite visible effects in diversion of business, some reductions in profitability, and a threatened elimination of competitors within the affected markets. On the contrary, long run injury within the secondary line can occur in almost all industrial markets where large discrepancies in size exist among customers (and occasionally suppliers) ; but such secondary injury will not ordinarily appear in any visible or immediate change in the profitability of firms or in any early decline in the number of competitors within these reseller (or supplier) markets. In the early stages at least, secondary line injury may only reveal itself as apparent economies of scale or integration—or simply as superior profits accruing to the more successfully managed retailers (or suppliers). Any competitive injury that does develop will take the form of a gradual process in which deep-discount buying-power advantages lead to a long term erosion in the relative profitability and to an eventual elimination of many smaller firms. This was certainly the case with the great chain store revolution in the 1920-30's and the resultant decline of "Mom and Pop" stores all over the country, which prompted the Robinson-Patman Act itself. However, economies of scale and integration were certainly at least as important as discriminatory pricing advantages in causing the long run success of these new forms of market organization and the decline and failure of many small volume marketers.[53]

Consequently, the legal standards for competitive injury in secondary line cases have emphasized the projected, long run dangers and effects of sustained, deep discounts upon smaller customers lacking access to these advantages. The leading case on the subject is still *FTC v. Morton Salt Co.*[54] The FTC has not retreated from this early "hard line" position on secondary line injury,[55] although sharp criticism of this policy has emerged among many economists and a few lawyers. In the *Morton Salt* situation, quantity-volume discounts were offered as follows:

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[53] Obviously, the relative importance of (i) efficiency gains from scale and integration or (ii) discriminatory purchase prices in the success of large scale retailing enterprises is very important in appraising the real need for the Robinson-Patman Act. Critics tend to discount the latter, while supporters discount the former. Although the available evidence allows no very precise estimates, both factors must be considered as substantial contributions to chain and department store growth.

Quantity	*Per Case*
Less than carload purchases	$1.60
Carload purchases	$1.50
5000-case purchases in any consecutive 12 month period	$1.40
50,000-case purchases in any consecutive 12 month period	$1.35

Only five companies bought enough salt to qualify for the lowest price, while almost all the Morton sales volume was in carload or larger lots. (Evidently, this differential made purchasing in less than carload lots uneconomical.) Hence, a differential of up to $.25 per case was involved between the largest and the smallest purchasers, *i.e.*, the lowest volume buyers paid 18 percent extra. In holding that sufficient competitive injury was demonstrated, the Supreme Court emphasized that:

> [T]he statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable probability that they 'may' have such an effect.[56]

Furthermore, the court reasoned that even relatively small differences in margin on a few items, repeated over and over again, could seriously handicap the small retailer. The court explained that:

> There are many articles in a grocery store that, considered separately, are comparatively small parts of a merchant's stock. Congress intended to protect a merchant from competitive injury attributable to discriminatory prices on any or all goods sold in interstate commerce, whether the particular goods constituted a major or minor portion of his stock. Since a grocery store consists of many comparatively small articles, there is no possible way effectively to protect a grocer from discriminatory prices except by applying the prohibitions of the act to each individual article in the store.[57]

This hard line *Morton Salt* policy has been consistently applied by the Commission since that time. The rationale for this tradition of cases has been more fully explained in two relatively recent circuit court opinions, both of which affirmed FTC orders.

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[54] 334 U.S. 37 (1948).

[55] *See* F. Rowe, *supra* note 33, at 172-206, for ample citation to the long chain of relevant authority.

[56] FTC v. Morton Salt Co., 337 U.S. 37, 46 (1948), quoting Corn Prods. Co. v. FTC, 324 U.S. 726, 742 (1945).

[57] FTC v. Morton Salt Co., 337 U.S. 37, 49 (1948).

In *United Biscuit Co. v. FTC*,[58] the Seventh Circuit affirmed a Commission cease-and-desist order based on volume discounts of only 6 percent. The court, although noting "the dollar amounts representing the discount differentials are small and not as great as those found in many prosecutions for section 2(a) Clayton Act . . . ,"[59] nevertheless found "sufficient evidentiary support"[60] for the FTC's finding of anti-competitive injury. The court relied specifically on *Morton Salt* and stated that:

> Independent store owners testified generally as to the highly competitive nature of the retail food business and that net profits are low; consequently, cash discounts and other allowances are important. One store owner testified "[W]e have to fight not only for pennies but for fractions." Moreover, certain of the independent store witnesses testified that price was very important, if not the most important factor in enabling them to compete. There was also testimony from these witnesses to the effect that if they could buy cheaper they could sell for less and that customers will, in the overall picture, buy where the prices are lower. The Commission said that "considering the highly competitive nature of the market and the other factors mentioned, a volume discount of 6% . . . was clearly substantial. Likewise substantial were the lesser discounts shown ranging up to 6%." The Commission concluded that there was sufficient evidence "to find that the competitive opportunities of certain purchasers were injured when they had to pay respondent [United] substantially more than their competitors had to pay and that the effect may be substantially to injure, destroy or prevent competition with the purchasers receiving the benefit of such discrimination."[61]

In *Foremost Dairies, Inc. v. FTC*,[62] the Fifth Circuit affirmed a Commission cease-and-desist order based on only 5 percent rebates to a chain on milk. The court reasoned:

> Where the evidence indicates an industry in which competition in the secondary line is keen, profit margins are low, substantial price differentials have been offered, and group or aggregate buying has been prevalent, the FTC's inference of probable competitive injury has been upheld even in the face of direct testimony by nonfavored customers that the price discrimination had not resulted in an injury to their business. . . . Indeed, it seems well established that where the record indicates a price differential substantial enough to cut into the purchaser's profit margin and discloses a reduction which would afford the favored buyer a significant aggregate saving that, if reflected in a resale price cut, would

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[58] 350 F.2d 615 (7th Cir. 1965), *cert. denied*, 383 U.S. 926 (1966).

[59] 350 F.2d at 621.

[60] *Id.*

[61] *Id.*

[62] 348 F.2d 674 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965).

> have a noticeable effect on the decisions of customers in the retail market, an inference of injury may properly be indulged. It is unnecessary that there be evidence that the favored customer actually undersold his rivals; a substantial price advantage can afford a favored buyer a material capital advantage by enlarging his profit margin in a highly competitive field or it can enable him to offer customer-attracting services which will give him a substantial advantage over this competition.[63]

Thus, the Federal Trade Commission has attempted to prohibit any significant price discrimination among reseller customers, even as low as 5-6 percent—unless, of course, these discounts could be cost justified.

Whether or not this policy has been entirely wise, pro-competitive, and in the interest of efficiency remains a difficult question; the answer depends upon several factors which are difficult to evaluate with existing data. One factor is the degree to which this secondary line policy has actually been enforceable. Although the overwhelming majority of the FTC's Robinson-Patman cases in nearly 35 years has involved some form of secondary line discrimination, it was known from the outset that it would be difficult to suppress all discount pressures. For this reason subsections (c), (d), and (e) were incorporated in the Act as harsh prophylactic rules, designed to prevent the subterfuges of indirect price discrimination through payments of brokerage, advertising allowances, or other services. One marketing practice, which has certainly allowed considerable statutory evasion, is the widespread invention of "differentiated" products (without much real variation in product content or cost) designed for different classes of customers. In extreme cases these differences amount to little more than labeling—*e.g.*, "brand name" and "private" label foods identical in content and real quality. Even though a few instances can be found where price discrimination achieved through this technique of private labeling has been successfully prosecuted under the Robinson-Patman Act,[64] the FTC has made little effort to police contrived distinctions between "different" grades and types of commodities. Any comprehensive effort in this direction would require much enlarged staff resources for the Commission and would still face awkward problems in establishing "like grade and quality" in many commodity markets. Yet Robinson-Patman enforcement has probably abated some of the worst discount pressure from large buyers: FTC orders, statutory penalties to enforce these orders, and threats of litigation are, after all, a financial deterrent for most prospective violators.[65] Also, the bargaining power of sellers to resist buyer discount pressure has been greatly aided by the hard line of *Morton Salt* and later decisions, because they can explain the unavailability of discounts as the dictate of legal necessity.

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[63] 348 F.2d at 680.

[64] *See, e.g.*, FTC v. Borden Co., 383 U.S. 637 (1966).

The second factor needed to evaluate secondary line policy is the degree to which enforcement has actually discouraged price competition. The harshest critics, such as Morris Adelman,[66] are convinced that this "overkill" effect has been a very important social cost traceable to the Robinson-Patman Act.[67] Adelman contends that the large, aggressive, roving buyers play a very important function in "breaking the price front" in all but the most highly concentrated, tightly disciplined seller markets. In reply the traditional FTC enforcers insist that this "dyke breaking" process rarely leads to a complete breakdown in a monopolistic pricing front; instead, what occurs most often is a "channelized" pattern of price discrimination. In other words, high price dykes will open only in favor of the large buyers—and the small buyers will continue to pay high prices. Furthermore, the traditionalists argue that the cost savings of the large buyers are rarely passed on entirely to consumers and are used instead to increase the relative strength of chain retailers through advertising and other promotional activities. Unfortunately, not enough is known about "dyke breaking" and "channelization." But some reasonable generalizations can be made about those market circumstances which would lead to either result. Whenever the size distribution of buyers is very lopsided and uneven, *e.g.*, with merely very large and very small buyers, one would certainly expect channelized price discrimination in favor of the larger buyers. Where buyer size varies more uniformly and medium-sized buyers exist in sufficient numbers, it will be much more difficult for sellers to confine their price concessions to the largest purchasers, and then discounts are more likely to be generalized. Seller size distribution will also affect the degree to which price concessions can be extracted in favor of the larger buyers. Where sellers are highly concentrated and well-disciplined—or at least enjoy the advantages of substantial product differentiation, such as the major breakfast cereal or baby food manufacturers—they have been able to resist discount pressures, often completely, and sometimes to the extent of making less significant or less general price concessions than are extracted from smaller sellers.

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[65] "[T]he FTC's penchant for sweeping orders can promote industry-wide trade restraints [price uniformity] in the guise of equitable Robinson-Patman enforcement . . . . [T]he FTC often promulgates a broad order to cease and desist, which . . . paraphrase[s] the . . . Act, on pain of penalties up to five thousand dollars per day, [which] can operate as a severe deterrent to price experimentation by sellers." Rowe, *The Anti-Price Discrimination Law*, 64 Colum. L. Rev. 415, 426-27 (1964).

[66] *See* M. Adelman, *supra* note 38.

[67] For an interesting and informative debate on these issues, see Dirlam & Kahn, *Antitrust and the Big Buyer: Another Look at the A & P Case*, J. Pol. Econ. 118-23 (April, 1952); Adelman, *Dirlam & Kahn on the A & P Case*, J. Pol. Econ. 436-41 (October, 1953); Dirlam & Kahn, *A Reply*, J. Pol. Econ. 441-46 (October, 1953).

Therefore, we can anticipate to some extent those industries in which secondary line price discrimination pressure will lead to generalized price reductions. Whenever relatively competitive buyer and seller markets face each other, one might expect prices to have been beaten down to more or less competitive levels with cost savings passed on to consumers. On the other hand, whenever lopsided buyer markets face sellers—as in the 1920's and 1930's—or whenever highly concentrated sellers face buyers of unequal bargaining power, channelized and sustained price discrimination is likely. In this connection, it must be stressed that co-operative buying groups can play a decisive role as medium-sized buyers; and they can serve to even out and make relatively competitive an otherwise lopsided distribution of buying power. Thus, the encouragement of buying groups for *small* purchasers may greatly diminish the likelihood of channelized, sustained price discrimination. In this way buying groups, in effect, can alter the market structure and behavior of many industries toward a more competitive performance—both for the benefit of small businesses, which will then have a greater chance for long run survival, and for the benefit of consumers, who are more likely to receive lower prices.[68]

Finally, the third factor which must also influence any appraisal of secondary line enforcement policy involves (i) the degree to which efficiency gains resulting from marginal cost pricing are now being forsaken; and (ii) the degree to which such marginal cost pricing, if allowed, might cause competitive injury. At stake is what economists often refer to as a "trade-off" between the costs and benefits of the present policy and those which would accrue from allowing more scope for marginal cost pricing. The practical problem for antitrust policy becomes one of estimating the relative importance of these efficiency gains and competitive losses. The more extreme critics of the Robinson-Patman Act generally insist that substantial, net efficiency gains could be achieved by many sellers if they were free to discriminate and employ marginal cost pricing; certainly, as noted previously, the logic of such pricing practices is frequently accepted in the public utilities and transportation sectors—where, with massive fixed investments in plant and equipment, short run marginal costs are often very low. Allowing sellers to sell some of their production or inventories at marginal cost would allow them to increase output, enhance competitive pressures on prices, and increase consumer welfare. Unfortunately, the extent to which efficiency gains would materialize outside these regulated sectors requires more empirical study, particularly concerning the degree to which these gains might be passed on to consumers in lower prices. But to many economists at least, the likelihood of some substantial welfare improvement through broader use of marginal cost pricing is significant enough to make the whole Robinson-Patman effort very suspect. On the other hand, others contend that to permit marginal cost pricing would create a grave, long run threat to competition, because many smaller businesses simply could not survive in the face of such sustained preferences for their larger rivals. To traditional FTC enforcers this threat, spread throughout a great many industries, looms very large indeed and outweighs any possible efficiency gains from allowing marginal cost pricing. Here, too, unfortunately, the kind of data that would enable a really confident estimate of the relevant "trade-off" is lacking.

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[68] *See* note 71 *infra* and accompanying text, for a discussion of the crucial importance of Robinson-Patman Act enforcement upon buying groups.

What then shall we do with the problem of standards of proof for secondary line injury? We can see that there may be some real "overkill" in the present hard line policy—in encouraging excessive price rigidity, in enabling higher prices to be maintained in many markets, and in frustrating the efficiency gains that could result from marginal cost pricing. However, we can also see risks of serious anti-competitive consequences if we should ease up too much in this direction. In my judgment, the best short term policy would be the following:

(1) The burden of proof for competitive injury in secondary line cases should be increased somewhat, but not too much. Basically, this would merely require a more realistic appraisal of the projected, long run dangers to competition from sustained deep discounts in favor of the larger buyers. Proof would have to be mobilized in terms of the relevant variables which indicate such a threat to competition, *i.e.*, the depth of discounts relative to prevailing margins in the relevant market. But shallow discounts of merely 5 or 6 percent would almost never be significant enough to constitute a threat to competition. As nonfavored customers testified in the *Foremost* case, injury to the small retailers would not ordinarily result from such narrow price differences. For example, in an industry where retailing margins averaged 25-30 percent over cost of goods sold, a discount of only 5 or 6 percent to the larger buyers would only increase their relative profitability by a

factor of about one-fifth; but where discounts of 20 or 25 percent were involved, large buyer profitability would be nearly doubled.[69] In this situation discounts of 25 or 30 percent might easily portend long run destruction of small buyers, whereas to allow discounts of merely 5 or 6 percent would enable some very desirable leeway for price haggling and increased competitive pressures that would probably yield much more price competition in the long run than could be threatened by such narrow advantages to the larger firms. As Corwin Edwards concluded: "It is unreasonable to attack minute inequalities among buyers."[70] The result of suppressing such minor price differences is simply to encourage an extreme price uniformity, which tends to make it much easier for oligopolists to reach a tacit—or even explicit—consensus on non-competitive pricing levels.

(2) Secondary line enforcement efforts should be concentrated in those markets where lopsided buyer distributions indicate that discount pressures will probably be channelized and not lead to generalized price reductions and competitive price levels. Such efforts should avoid markets so competitively structured that competitive price levels are to be expected, because no real threat to competition from discounts need be feared in these circumstances. In this connection the role of small business buying groups must be accurately taken into account, since their substantial presence may render a lopsided buyer distribution actually competitive in its bargaining performance, by generalizing what might otherwise be channelized discounts in favor of only the larger buyers.

(3) Secondary line enforcement policy must be greatly liberalized with respect to *small business* buying groups. Earlier FTC and court precedents that treat the collective bargaining efforts of small buyers as no different in impact from the deep discounts enforced by the very largest firms are guilty of tragically misunderstanding the relevant competitive dynamics.[71] Small business buying groups are a very healthy, natural market corrective to the lopsidedness of buying pressures, and they will actually be more reliable in assuring the survival of small business units than Robinson-Patman enforcement efforts. Therefore, small business efforts to bargain for equalizing discounts should not be interfered

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[69] Retailing margins are rarely much lower than 25-30 percent of the cost of goods sold; for example, grocery retailing margins have generally been in this range or slightly higher, and in many other industries retailing margins are often much higher. Therefore, in almost no conceivable industries would 5 to 6 percent discounts to the larger buyers constitute such a substantial relative advantage as to really threaten the survival of smaller retailers.

[70] C. Edwards, The Price Discrimination Law 639 (1959) [hereinafter cited as Edwards].

[71] *See, e.g.*, Edwards 626, 652; Rowe, *The Anti-Price Discrimination Law*, 64 Colum. L. Rev. 415, 419-20 (1964).

with by the FTC; however, this should not be construed as a blanket invitation for all buyers—regardless of size—to combine their buying power. Three requirements should be satisfied for buying groups to receive immunity from "R-P" sanctions: (i) the group must be composed only of "small" businesses, *i.e.*, the larger firms in the relevant markets cannot be allowed to participate in small business buying groups; (ii) no buying group, or combination of such groups, can be allowed to monopolize—or even to attempt to monopolize—the buying side of a market; (iii) buying groups must conduct their internal affairs in a non-discriminatory manner insofar as prices within the group are concerned. Finally, these requirements also imply a need for openness in the conduct of buying group affairs—and a ready access for the antitrust agencies to membership lists, assets and purchasing size of members, and prices and rebates paid by and to all members. These reforms in secondary line enforcement policy with respect to buying groups might easily do more than all of the other recommended changes in "R-P" enforcement policy; therefore, appropriate publicity should be disseminated to encourage further growth of genuinely small business buying groups.

(4) Some liberalization in proof of the cost justification defense is also desirable to prevent excessive price rigidity in the marketplace. Defendants charged with secondary line price discrimination should have a practical, and not merely theoretical, opportunity to present evidence that cost differentials really justified discounts to certain classes of buyers. This will require somewhat more relaxed standards insofar as cost "estimates" are concerned, *i.e.*, that they need not necessarily be in tremendous detail, or even contemporaneous to the alleged secondary line injury, so long as they reasonably indicate that differential costs really did justify the discounts involved. The FTC, its hearing examiners, and trial courts need only insist that defendants produce reasonable estimates of the relevant costs which supposedly justified the discounts, and they can rely upon plaintiff's counsel to point out the inadequacies of these estimates.

But more fundamentally, it is also desirable to allow a new latitude for proof of the long run cost savings resulting from the short run use of marginal cost pricing. This would open the door to eventual, substantial change in standards of proof for cost justification. However, since there is now great controversy among the relevant legal and economic experts as to any net efficiency gains (*i.e.*, after due allowance for anti-competitive effects) that we can expect from marginal cost pricing, we should proceed cautiously in this direction. The best procedure would be, at least in the earlier years of this approach, to insist that defendants attempting to show cost justification through marginal cost pricing provide a sufficient evidentiary basis for the following factual inferences: (i) that private efficiency gains resulting from marginal cost pricing be demonstrated with reasonable estimates; (ii) that the absence of any significant offsetting dangers to competition be demonstrated in terms of the relevant market structures (*i.e.*, market concentration, ease of entry for smaller firms, and the likely impact of deep discounts on the survival of existing smaller firms); and (iii) that these private efficiency gains flowing to sellers be passed on—at least in a very substantial degree—to the ultimate consumers in lower prices. If such a showing were required to justify discounts based upon marginal cost pricing, then we could really be assured that net social benefits did indeed flow from this practice. This interpretation for "cost justification" would be consistent with the statutory language and, most important, would be more in conformity with the objectives of promoting a maximum of competition economic efficiency.

(5) The meeting competition defense needs no significant adjustment, however, if somewhat more demanding standards of proof for competitive injury are imposed and the opportunities for proof of cost justification are liberalized. Then we can be much more confident that secondary line prosecutions will actually be founded upon real and significant competitive injury. Adherence to those well-established precedents which preclude use of the meeting competition defense for "buck passing" is still needed to enable successful prosecution of any systematic pattern of discounts which threatens real competitive injury.

(6) Finally, it will also be desirable to improve the administration of the "subterfuge" provisions (sections 2(c), (d), and (e) of the Clayton Act). However, it should be kept in mind that these provisions are framed as absolute prohibitions on any discounts disguised as brokerage payments, non-proportional advertising allowances, or other services; hence, the only real scope for liberalizing their application—short of statutory amendment—will be to screen out the competitively insignificant prosecutions under these provisions. When ample opportunities exist for more meaningful and much more demanding antitrust enforcement efforts in other areas—mergers, restraints of trade, and real competitive injury from price discrimination—it is a shame to waste good FTC manpower on trivial, technical violations of sections 2(c), (d), and (e). Unfortunately, too many of these cases have been brought in the

past, on the theory that the Commission should create a cheap impression of enforcement vigor by racking up a high score of such easy, trivial cases.[72]

Administrative Requirements for Improved Enforcement

Far too frequently, the administrative dimension is neglected by legal or economic commentators on antitrust policy. This often leads to the kind of scant readership and impact that tragically limits the flow of what otherwise might be very productive insights to those actually engaged in the administration of such complex public policies as the Robinson-Patman Act. This author's personal experience has convinced him that useful economic analysis, in particular, is so often wasted—unless the administrative implications are properly explored and used to explain the practicality of alternative approaches. What will be needed to implement the foregoing recommendations for a more economically sophisticated administration of the Robinson-Patman Act? Basically, it will require: (i) a larger allocation of economists from the Commission staff to price discrimination cases and related economic studies; (ii) a new outlook among many of the Commission trial lawyers engaged in price discrimination matters; and (iii) an increased ability and willingness among the private antitrust bar to exploit the present opportunity for a more sophisticated use of economic analysis and evidence, both as plaintiffs and particularly as defendants.

The need for these changes can best be appreciated by reviewing the recent administration of Robinson-Patman work within the Federal Trade Commission. During most of the 1960's, about thirty trial lawyers were engaged in "R-P" investigation and litigation in the Washington, D.C., home office. They were grouped into the Division of Discriminatory Practices (one of three litigating divisions in the Bureau of Restraint of Trade, each of roughly the same size). Their efforts were supplemented by a substantially larger number of field office attorney-investigators scattered throughout the country, who assisted with the investigation and preparation of many cases, but who were not allowed to try cases independently.[73]

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[72] The great majority of "R-P" cease-and-desist orders resulting from FTC enforcement have actually involved these prophylactic rules (sections 2(c), (d), (e) of the Clayton Act) designed to suppress indirect discounts. *See, e.g.*, Edwards 661-79, app. A, tables 1, 24 (a listing of "R-P" orders between 1936-57); National Commission on Food Marketing, Technical Study No. 8, Food Marketing 149-79, app. tables D-1 to, D-4 (June, 1966) ("R-P" orders between 1950-65).

[73] The restriction of FTC field office attorneys to the role of mere investigators has been a most pernicious limitation upon the attractiveness of these field offices to better legal talent; and it has apparently been lifted during the spring of 1970 by the then Chairman, Caspar Weinberger.

In addition, a few attorneys from the Compliance Division (the fourth division in "Restraint of Trade") would be working on such matters. But what will probably seem incredible to many outsiders is that scarcely any economic staff were assigned to discriminatory practice matters. Most of the economic talent occasionally assigned to such problems was provided in two ways: (i) memoranda prepared at the request of one or more Commissioners to help review trial staff recommendations for proposed "R-P" complaints or consent orders; and (ii) memoranda prepared for one or more Commissioners at the decisional stage, when litigated "R-P" cases, having been appealed from the initial decisions of hearing examiners, were being decided by the Commission. Some economic advice was thereby rendered at a more or less advanced stage of the investigative work and then again after litigation had been completed, when it was too late to correct whatever inadequacies might be present in the record from an economic standpoint. However, even this limited amount of economic assistance was rendered in a minority of the Robinson-Patman Act matters. Insofar as legal staff was concerned, this may have been a reasonable allocation of limited FTC resources—taking into account competing demands for antimerger, restraint of trade, and direct consumer protection work.[74] But the economic staff allocations were woefully inadequate for an economically sophisticated administration of the Robinson-Patman Act. What explains this state of affairs?

In the first place, the Commission's economists enjoyed considerable administrative independence (in many ways highly desirable) and chose to allocate most of their best efforts to investigating, analyzing, and attacking the great merger movement we have recently witnessed. Robinson-Patman matters were considered low priority investments for two reasons: (i) most price discrimination cases were deemed rather trivial in competitive significance as compared to mergers, since most challenged mergers could lead to a permanent impact in an entire market's structure, while most "R-P" prosecutions affected the pricing behavior of only relatively few firms and for a briefer period of time; (ii) the Commission's economists preferred not to get too much involved in the sometimes bitter, factional dispute among the Commissioners which erupted over standards for competitive injury in Robinson-Patman cases, because this might alienate one or more Commissioners and reduce support for the Bureau of Economics.

Secondly, most Commission lawyers saw little need for economic staff support in Robinson-Patman work. According to the earlier minimal standards of proof for competitive injury in "R-P" cases, this was probably a justifiable state of mind. After all, no great economic subtlety was necessary to demonstrate that "mere diversion" had occurred in primary line cases or that a "significant discount" had been offered in secondary line cases. Such prima facie burdens of proof were processed in rather routine fashion. But as the 1960's wore on, this simplified, traditional procedure broke down, as one or more Commissioners began to demand more proof of prospective competitive injury—or at least some indication of competitive importance—before "R-P" complaints could be issued.[75] Thus, as the rules began to change, trial staff became increasingly frustrated, and new complaint activity diminished in volume. What may seem odd in retrospect is that no great demand for economic staff assistance arose at this stage. Perhaps the explanation lies in trial staff hopes that the Commission might return to its traditional view or perhaps in the manifest lack of interest on the part of the economic staff. In any event, only very modest economic staff assistance was rendered for Robinson-Patman enforcement in recent years.

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[74] Roughly, equal *attorney* allocations were provided by the FTC in the 1960's for anti-merger, restraint of trade, price discrimination, and deceptive practice litigations, at least in terms of the main Washington, D.C., offices of the Commission.

Implementing a more up-to-date and sophisticated administration of the Robinson-Patman Act—one which inquires more carefully into the balance of competitive effects in each proceeding—will require, mainly for a transitional period, substantially more economic staff work: (i) to help select the more concentrated, less competitively structured industries for investigation of likely primary line injury and to help select the more lopsided, unbalanced buyer markets where channelized price discrimination is likely to cause significant secondary line injury; (ii) to assist the legal staff in satisfying a somewhat more demanding burden of proof for competitive injury in Robinson-Patman Act litigations; (iii) to assist the legal staff in responding to the occasional, new use of sophisticated marginal cost justifications for price discrimination; and (iv) to assist the legal staff in investigating and analyzing the competitive significance of buying groups in mitigating the need for secondary line enforcement efforts. It must be emphasized again that much of this economic staff assistance would only be needed in a brief transitional period—probably the first one or two years—during which the Commission's legal staff adjusted to its new requirements.

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[75] In most cases it was not necessary for a majority (3) of the Commissioners to send a proposed complaint back to the trial staff for further investigation or analysis, since such requests by any one or two Commissioners were, more often than not, acceded to by the Commission as a whole—perhaps as a mut[illegible]

During the 1960's at least, it was only the FTC's merger cases that received the benefit of substantial economic staff assistance. More of this resource should be invested in other aspects of the Commission's work, including price discrimination cases, restraints of trade, and deceptive practices, in order to achieve more genuine and relevant staff expertise—*i.e.*, economic sophistication. Frankly, for this agency to achieve fully its potential it must increase somewhat the relative proportion of economists to lawyers; such a change in the "input mix" is really long overdue. Although "simplistic" law enforcement can sometimes lead to economically desirable results, this is no longer a tenable approach to Robinson-Patman Act administration. (Nor is it appropriate any longer in most restraint of trade efforts, or even in some types of deceptive practice work.) In fact, one might even find it a "deceptive practice" for the Federal Trade Commission to hold itself out as an "expert" administrative agency in dealing with problems of "fair competition," unless it greatly increases its economic staff and assigns them in sufficient numbers to areas other than mergers; without some appropriate economic staff devoted to Robinson-Patman efforts, the FTC would not be mobilizing the "relevant expertise" that its statutory function demands.

Another crucial aspect of the need for stronger economic staff support in Commission efforts is the question of leadership. At least until very recently, the FTC's economists were only allocated two out of some sixty "supergrade" (*i.e.*, the highest salary) positions in the agency, a pitifully inadequate number when nearly 10 percent of the agency's "professionals" were rated as economists. In my own judgment, the FTC would function much more effectively with about 15 percent economic staff and a comparable share of the supergrade leadership positions. With six to ten supergrade salaries, this agency's economic staff could be built up to a level comparable in quality to that of the best academic economic departments in the country; certainly, the FTC's broad jurisdiction and responsibilities to enforce fair competition in the economy justify this kind of economic staff. To be sure, there is an "oral tradition" among some government antitrust lawyers that the best "staff economists" are those who merely prepare tables for trial attorneys, *i.e.*, high class "data clerks"; but this kind of naiveté should not be allowed to influence FTC staffing. Finally, it must be emphasized that even with an improved and expanded economic staff, there will still be a continued need for occasional consulting economists from the outside with special expertise or prestige; even with additional supergrade appointments, it would not be possible to obtain all of the economic talent that would be desirable in administering an economically sophisticated program of antitrust enforcement.

Quite apart from increased economic staff assistance, and perhaps more important in the long run, is the need for a new outlook among the FTC's trial staff engaged in Robinson-Patman enforcement. Fortunately, this should not be a particularly difficult problem to solve, for it is essentially a matter of leadership within the agency and that for chiefly a transitional period when standards for proof of competitive injury and related defenses are initially adjusted. Certainly the trend of legal education in antitrust and trade regulations has been running very strongly in favor of increased economic sophistication, and the more recent law graduates usually have been trained to accept a substantial role for economic analysis in these matters. This is evident among most of the current antitrust law professors and the text books which now dominate this field. Also, a large part of the antitrust bar—among private practitioners as well as government attorneys—have kept up in some degree with these developments. But it should not be surprising that some experienced antitrusters have lagged behind in this respect and that a portion of these antitrust lawyers lack the mental flexibility to easily adapt to more sophisticated economic standards of proof in Robinson-Patman matters.

Therefore, it is essential, at this critical crossroads in the history of Robinson-Patman Act enforcement, that the Commission select the leadership for senior trial staff with at least the right kind of mental flexibility, which is usually associated with the ablest antitrust lawyers. These men will not need advanced degrees in economics (though no harm would result if they had been obtained). What will be needed is a lack of that prejudice against economics and economists that some of the less able FTC staff attorneys exhibited in the past when questioned about the economic implications of the "R-P" or other antitrust policy problems. In fact, it is just this kind of improved mental quality that has been the main desire of most critics of the Commission; the bane of this agency in recent years has been a reputation for too much mediocrity in its staff leadership.[76] Certainly, the many critics of this agency will look to its new "R-P" enforcement efforts, which have traditionally been its most significant preoccupation over the years (in terms of complaints issued), as a major factor in assessing this agency's current performance.

A few comments are appropriate on the present structure of the FTC itself as an independent regulatory agency with plural (five man) leadership. Commissioner Philip Elman (who retired this past September after more than nine years service) made a recent proposal which has aroused widespread interest in antitrust and administrative law circles. He suggested that the Commission's adjudicative functions be transferred entirely to the courts and that the economic research, legal prosecution, and perhaps rulemaking functions be consolidated under a single commissioner[77]—similar to the present Food and Drug Administration. The main objectives of this change are to simplify the leadership and administration of the FTC, to provide a more attractive opportunity for its new single Commissioner, and thereby, hopefully, to improve the quality of the agency's leadership, its middle-management, and its long run performance. To those critics of the FTC who believe this agency should greatly improve its performance, such a proposal might have considerable appeal. However, it must be emphasized that these questions of overall agency leadership are really quite separate from the problem of finding the best fate for the Robinson-Patman Act—repeal, amendment, altered enforcement, or a return to traditional standards of proof. Regardless of what format is ultimately selected for leadership of the FTC or its sister agency, the Antitrust Division of the Justice Department, they still face the problem of what to do about price discrimination and its peculiarly ambivalent effects, which sometimes enhance but often weaken the forces of competition in our economy—the crossroads choice in the administration of the Robinson-Patman Act. The foregoing recommendations are directed primarily to those who will exercise antitrust policy-making responsibilities within the next few years, whatever the new organizational framework might be.

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[76] This was certainly one of the most important criticisms in the recent "Nader's Raiders" report, F. Cox, R. Fellmeth, & J. Schultz, "The Nader Report" On the Federal Trade Commission (1968), and in the Report by the American Bar Association's Committee to Study the FTC. This view was widely held, at least in recent years, among the private antitrust bar.

Some may have wondered, throughout the course of this appraisal of Robinson-Patman Act enforcement policy, why no recommendations have been made for statutory amendments, for a considerable number of the commentators on the Act have made such suggestions. The words of Corwin Edwards, former Chief Economist at the FTC and author of the most comprehensive empirical study of "R-P" enforcement,[78] are particularly appropriate as an explanation:

> [T]he Robinson-Patman Act could [certainly] be amended to accomplish its purposes more successfully. There is little doubt that a bill could be drafted that would be a great improvement on the present statute. . . . However, whether or not such a bill could be passed is problematical.

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[77] Address by P. Elman, before the Antitrust Section, American Bar Association, Aug. 12, 1970, printed at *The Regulatory Process: A Personal View*, 475 Antitrust and Trade Regulation Report app. D-1 (Aug. 18, 1970).

[78] Edwards, *supra* note 70.

> In law-making, group interests and conflicting ideas come into conflict and result in modifications of legislative proposals in the search for a compromise that will win legislative and executive assent. This is always an uncertain process. The uncertainties are at their maximum when the subject matter is complex enough to be readily misunderstood, and when the groups whose interests are in conflict are numerous enough to provide opportunity for shifting alliances and for tactics based on concealment and sabotage. . . . Group conflict, obfuscation, and misunderstanding have been conspicuous in the efforts that have thus far been made to amend the law of price discrimination.
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> . . . .
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> The central question for anyone who would amend the Robinson-Patman Act is whether the new statute would be nearer to or further from his objective. There would inevitably be political struggle between big and little business, between various classes of producers and distributors, and between spokesmen for different types of industry. Underlying the conflicts of interest would be unresolved issues as to the relative importance of different purposes: Is the vigor of competition among sellers or competitive opportunity among buyers more important to competitive vigor? What is the relative importance of fairness in competition and flexibility and vigor therein? What should be the relative emphasis on the immediate impact of a business practice and the less certain but possibly more significant future impact thereof? In approaching such problems under the pressure of warring groups, congressional action would be exceptionally unpredictable.[79]

Therefore, since a far more certain and predictable method of making good sense out of the Robinson-Patman Act is available if we should implement a more economically sophisticated enforcement policy, I strongly suggest that this route is preferable to the great risks of emerging with something even worse by seeking legislative amendment in the Congress.

Finally, but not without considerable significance, we should be aware that private practitioners will inevitably have a part to play in resolving the current controversies over Robinson-Patman Act enforcement. The skill and imagination of counsel for private plaintiffs and defendants have already been important in the recent trend toward more demanding standards for competitive injury in cases involving primary line price discrimination.[80] If we should generalize this trend to include secondary line price discrimination and also allow somewhat more scope for the cost justification defense, the opportunities and responsibilities for private counsel would be increased substantially. By developing more complete evidence of the relevant costs, pricing patterns, and their competitive impact in "R-P" cases, private counsel would aid materially in improving the administration of this statute. By contributing to a climate of increased legal-economic sophistication concerning the proper scope for price discrimination, private counsel would enable small and large businesses to compete more vigorously, while preserving legal safeguards against predatory pricing and deep discounts which really threaten significant anti-competitive effects. In these ways private counsel could multiply the enforcement impact of the federal antitrust agencies and could also serve to prod these agencies into a more sophisticated enforcement of the Robinson-Patman Act, a result more consistent with the ultimate purpose of the antitrust laws—the promotion of competition, economic efficiency, and a decentralized and democratic system of business enterprise.

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[79] *Id.* at 633-34.

[80] Leading cases, such as Anheuser-Busch, Inc. v. FTC, 289 F.2d 835 (7th Cir. 1961), which led appellate courts to restrict excessive "R-P" enforcement zeal by the Commission, are in large measure the work of imaginative private defense counsel.

PREPARED STATEMENT OF JOHN J. FLYNN, PROFESSOR OF LAW, UNIVERSITY OF UTAH, SALT LAKE CITY, UTAH

Mr. Chairman and Members of the Committee. My name is John J. Flynn. I am a Professor of Law at the University of Utah, Salt Lake City, Utah. For the past twenty years I have been engaged in the teaching and practice of antitrust law. In addition I have been teaching regulated industries, law and economics and jurisprudence. During that twenty years I have served as Visiting Professor of Law at the University of Michigan, the University of Texas, the University of Pennsylvania, Washington University in St. Louis, and Georgetown University in Washington, D.C. I am also the co-author of a book in the field of antitrust entitled "Antitrust and Regulatory Alternatives" with Professor Louis Schwartz of the University of Pennsylvania. We are currently in the process of preparing the Sixth Edition of that work with an added co-author, Professor Harry First of N.Y.U. I have served "of counsel" or counsel in over one hundred antitrust cases, many of them of significance. My practice has been before courts of every level including the United States Supreme Court, and, I have represented plaintiffs and defendants. In the late 60's and early 70's I served as a special counsel to the Senate Antitrust and Monopoly Subcommittee which was then chaired by the late Senator Philip Hart of Michigan. I have served as Chairman of the Law and Economics Section of the American Association of Law Schools. Over the years I have appeared frequently before committees of both Houses of Congress, state legislatures, and spoken on mamy occasions before the bar associations of various states, the American Bar Association and trade association groups throughout the country. My appearance before this Committee is at the invitation of the staff. I do not represent any particular interest group or client and I have been invited to give my views with regard to the current administration of the antitrust laws by the Antitrust Division and the Federal Trade Commission free of the bias of a particular client or cause. Because of the jurisdiction of this Committee I shall limit myself to remarks aimed primarily at the effect of current policy in the enforcement agencies as it relates to small business and medium sized business.

I

One cannot fully comprehend the current enforcement stance of both the Department of Justice and the Federal Trade Commission without some introductory comments with regard to the underlying philosophies of Assistant Attorney General Baxter and Chairman Miller. Both are strong proponents of and devoted followers of the so-called "Chicago School of Economics". This is a school of thought, of relatively recent vintage, which emphasizes one form of economic analysis (the neo-classical or "Chicago School" approach) and advocates that it be made the exclusive premise of antitrust enforcement. It is a school of thought whose basic assumptions are under substantial attack and whose methodology for analyzing the facts of real cases is open to serious question. To paraphrase the late Fred Rodell, there are only two things wrong with the philosophy: one is form, the other is substance. In the academic world, the leading proponents of this form of analysis of issues antitrust have been Professor Posner, now a judge on the United States Court of Appeals in Chicago, Professor Bork, now a judge on the United States Court of Appeals for the District of Columbia, and—among others—Professor Baxter, now Assistant Attorney General of the Antitrust Division, and apparently Mr. Miller, now Chairman of the Federal Trade Commission. I will not rehearse all the elements of that school of thought here or the considerable debate and discussion which it has provoked in academic circles. Many of the issues are discussed at great length in: Symposium on Efficiency as a Legal Concern, 8 Hofstra L. Rev. 485 (1980); Symposium on Antitrust Law and Economics, 127 U. Pa. L. Rev. 918 (1979); Antitrust Jurisprudence: A Symposium on the Economic, Political, and Social Goals of Antitrust Policy, 125 U. Pa. L. Rev. 1182 (1977); Symposium, The Goals of Antitrust: A Dialogue on Policy, 65 Colum. L. Rev. 363 (1965). Its major implication for antitrust is that it would limit antitrust intervention in the "market" to actions aimed at removing private arrangements restricting output, that is "output" as defined by the model. All other structure and conduct would be presumed to be efficient or subject to the self-correcting forces of competition. The discussion and the debate this position has provoked have been useful in many ways by challenging old assumptions and calling attention to the costs of government intervention in the market. Where translated into enforcement policy however, the philosophy has generally been a disaster for the effective and fair administration of the antitrust laws. I say disaster, because the artificial and abstract conclusions of the theoretical academic debate have been translated into enforcement policy, without regard for the serious and, I believe, devastating questions which have been raised about this school of thought and because it has been done without the approval of Congress and, in many instances, of the courts. Of even more concern, the implementation of the new philosophy (I prefer to call it a theology) has been done without much regard for reality, the broader goals of the law or the methodology and function of the legal process.

The current Administration's economic philosophy includes three complementary dogmas. One dogma is the belief that our inflationary problems can all be cured by simply controlling the money supply. This is the "monetarist" theology, whose followers are fond of attacking whatever the Federal Reserve Board does as never being the right response, at the right time or with the right intensity. A second theory, on the fiscal side, is that by simply cutting taxes without regard to other factors influencing the economy, we can have Nirvana, because the increase of the supply of discretionary income to the consumer will fuel a massive recovery of the economy. This is the "supply-side" theology, where proponents are fond of drawing curves on napkins. The third thesis, the one being followed by the Antitrust Division and the Chairman of the F.T.C., is one which asserts that a variant of the model of neoclassical economics should be rigorously followed in antitrust enforcement to the exclusion of all other considerations. This is the "Chicago school" theology, whose priesthood is fond of drawing supply and demand curves and coining slogans like "consumer welfare" and economic "efficiency." We should pretend that the economy is governed by consumers equal in all respects, that consumers behave rationally in all circumstances, power and wealth distribution are equal, large institutions do not exist or behave like individuals, and that the task of the law is to get government interference in the free competitive economy out of the way of rational economic man except for a narrow range of activity restricting output. Once these objectives are realized, the bounty of the private economy will be realized for the benefit of us all.

These policies have been implemented for the past year to eighteen months by the Reagan administration in monetary, fiscal and antitrust policy. In monetary affairs the Administration has been fostering a very rigid policy of tight money, following the philosophy of Milton Friedman. In the area of fiscal affairs the supply siders have been carrying the day by securing massive tax cuts without much concern for other factors like deficits, high interest rates, unemployment, and lagging demand. In both of these areas we have seen recent reversals of policy because the theology of the monetarists and the supply siders has collided with reality. It was a reality suggesting we were rapidly advancing into a depression as the result of high interest rates and bulging deficits. Reality has indicated that simplistic solutions vigorously followed to the exclusion of other relevant considerations simply do not work and are often counterproductive. While each theology may have some grains of truth to its view of the world and part of the solution for our problems, the insistence that the theology be followed rigorously and excessively to the exclusion of all other insights has helped lead us to a disastrous economic situation that Congress and the President are now trying to alleviate. In recent weeks the Fed has reversed its policy with regard to tight money and Congress and the President have substantially altered, in a "mid-course correction," the fanaticism with which supply side economics was applied in last year's tax cuts in the face of ballooning defense and entitlement expenditures. Unfortunately, a similar reversal of course has not followed with regard to the dogma being applied in the area of antitrust.

Instead, the leaders of the enforcement agencies have stated bluntly that they intend to apply the "Chicago School" theology to all aspects of antitrust enforcement, despite the broader purposes of Congress when it adopted our basic antitrust statutes, despite its adverse consequences for the competitive process, and despite the well-established precedent to the contrary continually reinforced by the courts. They continue to do so despite mounting criticism of the assumptions of the theology, the values it represents, the consequences for our long-term economic vitality, and the methodology by which it is implemented.

Each of these three simplistic policies has common elements. Each is rigidly applied, is put forth as the path of truth and wisdom, and claims that other considerations are irrelevant. The monetarists seek to restrict the output of money into the economy in order to dampen what monetarists see as the main taproot of inflation; the supply siders seek to restrict the income of government and the output of government services on the theory that the government is the source of all evil, and private waste and economic power are irrelevant; and, the neoclassical position in antitrust seeks to restrict the influence of government as a counterweight to private aggregations of power in the economy deciding the future structure and evolution of the economy and dictating to retailers and consumers the price they shall pay for goods and the places they may be purchased. Government intervention in the market system to rectify market malfunctions, anticompetitive structure or behavior distorting the competitive process is seen as an evil or as counterproductive unless it is aimed at clearly proven restrictions of output. Private intervention in the "market" is otherwise presumed to be "efficient" or as promoting "consumer welfare" because the model has built into it a series of assumptions and constraints which admit of no other hypothesis.

The neoclassical theory as applied in antitrust rests upon several assumptions and value judgments; assumptions and value judgments under serious attack by several commentators and assumptions and values that are inconsistent with those Congress believed it was implementing when it adopted the antitrust laws. See Fox, The Modernization of Antitrust: A New Equilibrium, 66 Cornell L. Rev. 1140 (1982); Brodley, Limiting Conglomerate Mergers: The Need for Legislation, 40 Ohio St. L. J. 867 (1979); Sullivan, Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships, 68 Calif. L. Rev. 1 (1980); Schwartz, On the Uses of Economics: A Review of the Antitrust Treaties, 128 U. Pa. L. Rev. 244 (1979). See also, M. Hollis & E. Nell, Rational Economic Man (1975). The Baxter-Miller approach to antitrust issues, an approach based upon views honestly held, brilliantly articulated, and rigorously applied, embraces fully the abstract theoretical speculation of the neoclassical school. In addition, as Kenneth Dam has observed in commenting on a paper by Baxter "The Political Economy of Antitrust," p. 81, published in 1980 by Lexington Books, Mr. Baxter's views are the "result of the current intellectual imperialism of high-powered economists who (1) believe that economics can be used to uncover nearly all knowledge worth having about our social and political institutions; and (2) profess that there is little worth knowing about those institutions that cannot be expressed in quantitative terms. In this imperialist war, economics is their strategy and regression their preferred weapons." The rigid use of deductive logic in the employment of the "intellectual imperialism" associated with this form of economic analysis produces the arrogance of true believers intolerant to the views of others, with disdain for the insights from history and other disciplines, and oblivious to the broader function of law in our society to implement the moral values of society. Its claims to be a "science" are beyond belief and the belief that its methodology produces truth and the "right" result in formulating antitrust policy should be ranked with similar claims made for "Ouija" boards and astrology.

Mature science recognizes its models as working hypotheses limited by the assumptions underlying the model and the unvarnished consequences of applying the model to brute reality. The hypothesis is only a beginning place for aiding in our understanding of reality; one always subjects to rejection where the assumptions and reality do not equate and one never has to be held up as a "totem" immutable and free of change. (See T. Kuhn, The Structure of Scientific Revolutions (2d Ed. 1970); J. Covant, Modern Science and Modern Man (1953); A. Whitehead, The Function of Reason (1957).) These limitations upon "scientific" reasoning are widely accepted in the physical sciences, where there may be some reason for a belief that there are fixed, ultimate, and universal rules governing the behavior of matter and celestial bodies. We have yet to discover those rules, if, in fact, they do exist, and I am confident that many "scientists" will be startled to learn that some economists claim their discipline to be a "science" and one which has discovered the fixed and immutable rules capable of governing and quantifying human and institutional behavior that dictate what society's law should be and should not be. The fact that their model is constructed out of thin air, with no reference to such other sources of human knowledge as psychology, history, sociology, and law, seems to matter not to the true believers. It does, however, point up the fact that this form of economic analysis is not a "science" but it is a religion premised upon a well-hidden series of value choices and ideological preferences, seldom discussed, dictating how our economic affairs ought to be ordered. The refusal to re-examine fixed assumptions in light of other sources of wisdom, the relevance of competing value choices, and the evolution of reality is accompanied by an exclusive preoccupation with manipulation of the fixed elements of the model and the creation of an ever more elaborate structure of complex rules and jargon attempting to adjust reality to the dictates of the underlying dogma. Joan Robinson, the distinguished English economist, described the consequences of this state of affairs in the "science" of economics as follows:

"Mathematical operations are performed upon entities that cannot be defined; calculations are made in terms of units that cannot be measured; accounting identities are mistaken for functional relationships; correlations are mistaken for causal laws; differences are identified with changes; and one-way movements in time are treated like movements to and fro in space. The complexity of models is elaborated merely for display, far and away beyond the possibility of application to reality."

(Robinson, "Introduction to V. Walsh" and H. Gram, "Classical and Neo-Classical Theories of Equilibrium," xi (1979).)

Such an approach cuts off constructive dialogue and the common struggle we all face in seeking insights into reality for the betterment of the common good. It is startling to read about economists spending four hundred pages discussing human motivation without mentioning Freud or Jung or postulating simplistic theories about the behavior of firms without mention of C. Wright Mills or modern organizational theory. The cloister of some forms of modern economic theory reminds one of medieval medical practitioners, content to eliminate the vapors by bleeding the patient until there was no blood left, whereupon responsibility for the result could be laid off on the deity—in this case, the "market." Moreover, such a "scientific" system deceptively sidetracks the debate of what public policy *ought* to be into a rigid, closed, and static system of analysis where the conclusions are as much "given" as the peculiar assumptions of fact, and the narrow specification of certain values. Professor Mason has described the consequences of this methodology as follows:

"'Deception occurs because the pure theories of this (individualistic neoclassical) framework are consistently misapplied in the interpretation of concrete reality.' . . . Accordingly, so-called empiricists have sought to verify their own hypotheses and to demolish contrary views by selection and manipulation of data that cannot accomplish either purpose. Such performances have been characterized as 'blatantly ascientific' . . . and an 'abandonment of empirical science for a numerology similar to astrology.' . . .

"Economic theory has developed from exchanges in the free market for ideas. Ironically, too many of the neoclassical defenders, of which monetarists comprise the dominant sect, attempt to restrict this market by making pronouncements based on unrealistic assumptions, then asserting the irrelevance *of the irrelevance* of the assumptions. Granting the validity of such methodology would terminate the dialogue on economics and convert the 'science' into a babel of competing dogmas of self-appointed prophets." (Mason, "Some Negative Thoughts on Friedman's Positive Economics," 3 J. Post. Keynesian Economics 235, 244, 250 (1980)).

One of the underlying assumptions of this school of thought, is that the proponents of government intervention in private economic affairs bear a heavy burden to demonstrate that government intervention will provide positive "benefits"—but only those "benefits" the model describes as "positive." This underlying assumption is based on the ideological premise of Professor Coase in his famous article, "The Problems of Social Cost," 3 J. Law & Econ. 1 (1960). Coase stated: "In determining whether governmental intervention in the economic system is appropriate, it is never sufficient to demonstrate that, without intervention, the market would operate imperfectly; government also operates imperfectly so what is necessary is a comparison between the actual workings of market and government and the particular setting." Coase's put forward no evidence or hard data to support this belief because there is none to demonstrate articles of political faith, but Coase's belief has become a rock bottom belief of proponents of neoclassical economic analysis of legal issues in the antitrust field. It shifts the burden of proof in such a way that it is not enough to show certain practices injure the commonweal; one must also show that government intervention will do better than an abstraction, "the market." Why this is so, and how it can be done, are not explained.

The proponents of economic analysis of antitrust issues make several fundamental factual assumptions in constructing their models. They have been described as follows:

"The fundamental assumptions underlying the market theory are as follows: first, there are numerous sellers who sell homogenous goods to numerous and undifferentiable buyers; second, sellers and buyers both possess complete information about the goods, demand, supply and prices; third, market entry and exit for both sellers and buyers is costless; fourth, separate or external cost of sellers and buyer transactions are non-existent. A fifth general assumption, explicit in the concept of exchange, is that the parties have the capacity to engage in exchange through either the holdings of goods for sale or exchange or a stock of money with which to buy goods. This implicit assumption is limited, however, by the assumption of numerous sellers and buyers which dictates the existence of a distribution of goods and money and requires that all sellers and buyers operate within wealth or budget constraints, and, further, by the assumption that individual transactions are very small in relation to the total volume of transactions.

"Under these assumptions, economic theory postulates that exchange will occur and continue so long as each transaction is mutually advantageous to the parties to the transaction. The point at which no further exchange occurs is called economic equilibrium, the condition under which no further transactions will benefit one party without causing disadvantage to the other. Reaching such a point is efficient in economic terms, that is, an efficient or value-maximizing allocation of resources has been achieved by mutually advantageous exchange." (D. B. Rice, "Consumer Transactions," 32-4 (1975).)

Professor Sullivan has succinctly summarized where these assumptions lead one in fashioning specific antitrust rules: "This approach . . . uses two static, structural models: the competitive market and the monopolized market. From the assumptions of neoclassical economics it establishes theoretically that when an industry is monopolized, there will be less investment, lower output and higher prices than if, other things being equal, the industry were competitive. Chicago analysis asserts that where monopoly exists resource allocations will be inefficient in the sense that total consumer satisfaction, as measured by market prices, will be less than if the market were competitive.

"Having only two structural models, this school relies on cartel theory as the only basis other than monopoly to explain the occurrence of noncompetitive performance. Moreover, many analysts adhering to this tradition regard monopoly as rather rare and cartels as subject to great instability. The constant threat of entry and the constant discipline of interindustry competition reduce both the probability of monopoly and the longevity of cartelization. Chicago theory recognizes few barriers to entry other than scale efficiencies and governmental action, such as tariffs, patents and franchises. It deals with vertical restraint through monopoly and cartel theory. Restraints that threaten foreclosure, such as tying, tend to be deemed expressions of the urge to discriminate and, though signifying some degree of horizontal power, are viewed as having no greater operational significance than other modes of discrimination. Resale restraints are viewed as harmful only if imposed at the instance of dealers utilizing the manufacturer to implement their own cartel. If such restraints are imposed by the manufacturer they are regarded as incapable of raising prices above a competitive level because of competition from substitute products and adjacent industries, and the threat of new entry. Since the manufacturer is assumed, theoretically, to be acting in its own self interest and subject to the discipline of the market, it is inferred that these restraints are efficiency producing. A manufacturer's minimum resale price, for example, may be aimed at achieving the most efficient relationship between manufacturer and dealer promotion. So viewed, it is a contrivance intended to induce dealers who, in their own competitive striving, will seek to expand sales so long as their costs are below the minimum price, to keep spending more for promotion until their marginal costs and marginal revenues intersect.

"Chicago theory makes for an attractively tidy antitrust world. Because private markets work surpassingly well so long as government does not interfere with them, and because most apparent aberrations turn out upon analysis to reflect efficiency producing decisions by traders operating under the constraints of competitive pressure, the antitrust policemen need not be exceedingly busy. It is necessary to keep a sharp eye out for cartels, of course, for though cartels are always under pressure and soon fall apart, they may do some harm before that inevitable end. Thus, there is some socially efficient level of investment in antitrust enforcement. All that remains is for Congress to work out an efficient matrix of deterrents, and for enforcement agencies to direct their activities solely toward those violations that Chicago school theory identifies as socially harmful." (Sullivan, "Economics and More Humanistic Disciplines: What Are The Sources of Wisdom for Antitrust," 125 U. Pa. L. Rev. 1213-15 (1977).)

It should be noted that these highly abstract and artificial assumptions underlying the model do not equate with reality. The rules they produce also do not reflect reality or implement a wise public policy. Instead, the assumptions are a series of factual hypotheses premised on ideological value choices giving rise to several further static rules and sub-rules which economists then use to test experience and reality without reference to the dynamic nature of complex relationships, time, power and imperfections in the "marketplace." For example, the assumption that man is the rational maximizer of his ends in life is an assumption that is without any moral content or role for the policies of the law or other societal institutions controlling the decisions of individuals or institutions in the private economy. It is an assumption blithely transferred to institutions Adam Smith never dreamed of, such as the large corporation, unions, and the other complex institutions of the modern post-industrial society. It is also a concept transferred to individuals living in a society with few frontiers, a wage base system of earning a living, inundated by advertising, and subject to mounting collectivism and homogenization by mass communication. Most of the individuals living in our society are dependent upon their status with a large institution for their economic security. They are not the yeoman farmers or individual entrepreneurs of Adam Smith's time. In addition to the gross generalizations about consumer and firm behavior, one indulged in without reference to any of the other disciplines in the academy, neo-classical thought makes several other assumptions. It assumes that all demand curves slope downwards, that all producers are rational maximizers, that all consumers have all the information needed to make rational choices, that there are many sellers of equal strength in the market and none has power, that the distribution of wealth is irrelevant, and that consumers are sovereign and have all power—while firms have none. It should be noted that no empirical evidence supports these claims and common experience refutes most of them.

Advocates of a neoclassical analysis of legal issues argue that the legal system should follow the judgments of the "market" that they construct with the series of unreal assumptions outlined above, rather than the legal system regulating such matters as individual choice or the power of large institutions and mass advertising to mold or dictate choice. This position stands the law on its head and it is a position contrary to the other assumptions engaged in by Adam Smith when he formulated his basic theories about a free market. Smith and the other great thinkers of the western economic tradition assumed that the choices of rational maximizers would be controlled and directed by the moral views of the society expressed through society's laws and other institutions concerned with defining the moral and other values of that society. Law serves as the means by which the conflicting claims of "rational maximizers" are sorted out. It prohibits some choices because they are inconsistent with the moral, social or political values of society. Other choices are regulated because of their impact on the claims of other individuals; while still other choices are not regulated because a moral evaluation of the circumstances indicates choice "ought" not be regulated. Were it otherwise and were law made subservient to the demands of the "market," we would have a system of "might makes right" and one leading to hedonistic anarchy. Lawmaking institutions, legislative and judicial bodies in our system, are engaged primarily in making these moral choices when they adopt and interpret laws like the antitrust laws. They are continually deciding what conduct "ought" and "ought not" be permitted. They are not engaged in the enshrinement of abstract theoretical models premised upon unreal factual assumptions to be mechanistically applied without regard to the moral purposes of the law and the practical consequences of its application to the real affairs of the world.

From these underlying factual assumptions, none of which equate with reality, the following subsidiary assumptions declaring how economic life ought to be ordered are made by the proponents of the neoclassical theology. The first assumption is that there is an inverse relationship between price and quantity demanded. A second assumption is a concept of cost as the price that resources consumed in making the product will command in their next alternative use. A third assumption is that resources will gravitate freely to their highest use if free exchange is permitted in a perfectly functioning market, and that when so used, resources are being employed "efficiently" under a condition of scarcity and rational maximization. All these assumptions lead to a definition of efficiency as "exploiting economic resources in such a way that value—human satisfaction as measured by the aggregate consumer's willingness to pay for goods and services—is maximized." See Posner, "Economic Analysis of Law," p. 9 (2d E.D. 1976). Eugene Singer notes that those following this line of analysis are confronted "with insuperable difficulties because of the incompatibility of the utilities of different individuals. There is no economic or objective solution for finding a 'bliss point' which maximizes the satisfaction of consumers." E. Singer, Antitrust Economics and Legal Analysis 3 (1981). Economists ignore the problem by burying it in an "aggregate" measure of satisfaction in their definition of "efficiency", a device the law cannot use if we expect peace to prevail.

Proponents of economic analysis by the law also ignore non-quantifiable values like equity, fairness, and justice. Instead, the measure of "efficiency" is a static one of quantifiable factors, but only those factors deemed relevant by the model. It is a way of measuring "efficiency" similar to that followed in the Vietnam War. You may remember that the yardsticks of efficiency in that unhappy war were "body counts," tons of bombs dropped and numbers of "pacified villages." It was a form of thinking which has been described as follow. It is a description equally applicable to Chicago school thinking as a guide to wise antitrust enforcement:

"The first step is to measure whatever can be easily measured. This is OK as far as it goes. The second step is to disregard that which can't be measured or give it an arbitrary quantitative value. This is artificial and misleading. The third step is to presume that what can't be measured easily really isn't very important. This is blindness. The fourth step is to say, What can't be easily measured really doesn't exist. This is suicide." (A. Smith, "The Last Days of Cowboy Capitalism," The Atlantic Monthly, Sept. 1972, p. 43.)

This strange concept of "efficiency" is the one that you hear the proponents of neoclassical economic analysis continuously invoking when they criticize existing antitrust rules. What this concept means, why it should be the sole goal of antitrust policy and what practical consequences flow from applying it to the affairs of a world not in conformity with the assumptions of the model are all questions of considerable magnitude. Economists, no less than legal scholars, are in wide disagreement as to what it means and what consequences would flow from its use in the real world, let alone agree upon a uniform explanation of why it ought to be the sole goal of antitrust policy. See, "Symposium on Efficiency as a Legal Concern," 8 Hofstra L. Rev. 485 (1980). When construed to mean antitrust actions should only be brought against the power to restrict output and when coupled with a presumption that all other private activity is "efficient," the concept gives rise to a radical limitation upon antitrust policy as a device to do anything. See, Fox, "The Modernization of Antitrust: A New Equilibrium," 66 Cornell L. Rev. 1140, 1159–62 (1981). It allows Professor Bork, now Judge Bork, to define competition as follows: "Competition may be read as a shorthand expression, a term of art, designating any state of affairs in which consumer welfare cannot be increased by moving to an alternative state of affairs through judicial decree." (R. Bork, "The Antitrust Paradox: A Policy at War With Itself," p. 61 (1978).) Such a definition, of course, makes judicial decrees the sole focus of antitrust analysis and amends Section 1 of the Sherman Act to read "Every judicial decision not enhancing consumer welfare is hereby declared to be unlawful." It is the philosophy followed by this Administration and explains why there has been a dramatic decline in enforcement. It is a philosophy which turns the law on its head and is nothing more than the expression of a form of extreme libertarianism applied to antitrust policy.

What is involved in this kind of thinking is a series of covert tautologies. Whatever the market does is efficient and "efficiency" is whatever the market does. The law should not interfere in whatever is efficient; whatever the market does is efficient; and, the law should not therefore, interfere with the "market." While one should not criticize primitive man for believing in such a reasoning process, for example the convictions of the "cargo cults" of the South Pacific who came to believe that the diety was a pilot in a Air Force cargo plane, one would hope that modern man has grown beyond the simplistic logic of such an approach to reality. Peter Wiles has commented on the strange assumptions and logic of this form of analysis as follows:

"Neoclassical economics consists of a highly idiosyncratic, protective, restrictive, lock-step methodology, that, surprisingly leaves its practitioners free to believe almost (but not quite) anything. The methodology studies intensively a narrow range of facts which it mercilessly preselects. It is an only partly scientific methodology without an attached ideology. The passions that used to characterize the latter in the classical period, however . . . now attach themselves to the former.

"Thus the plodding ox of a commonplace, understated and tolerant Weltanshauung has been yoked to the racehorse of an axiomatic methodology. This is a unique state of affairs in the world of the intellect. It makes of economics a very peculiar subject indeed." (Wiles, "Ideology, Methodology, and Neoclassical Economics," 2 J. Post-Keynesian Econ. 155, 160–61 (1979).)

One might add that the application of such an ideology and methodology to antitrust enforcement makes antitrust enforcement a very peculiar subject indeed. Rather than being viewed as society's means for challenging and regulating the exercise of undue private power in the economy, it becomes a rationale for defending such power by simply assuming it to be the expression of the "efficient operation of the market." It makes antitrust policy the defender of the very thing Congress meant the law be used to regulate.

Elsewhere I have commented that a further fault with this type of approach to antitrust enforcement is the methodology that is employed in the application of the model. (Flynn, "The Misuse of Economic Analysis in Antitrust Analysis," 12 Sw. U. L. Rev. 334 (1981).) In philosophical terms, it is a combination of discredited forms of determinism and positivism. To one trained in philosophy it has the earmarks of Rudolph Carnap's analytical positivism and appears oblivious to modern insights about the function of perception, facts, concepts, language, and logic in the thinking process. In order to avoid the obvious criticism that the assumptions of the model do not equate with current reality, some advocates—the most notable Milton Friedman—argue that it is scientifically inappropriate to compare reality with the assumptions of the model. The true test of the model's validity, it is claimed, is made by comparing the implications of the model with the facts observed. See M. Friedman, "The Methodology of Positive Economics," reprinted in Essays in Positive Economics (M. Friedman ed. 1966). This is indeed a curious notion about scientific reasoning, namely that we must test a theory's implications against fact, but not its assumptions. See, Kornhauser, "A Guide to the Perplexed Claims of Efficiency in the Law," 8 Hofstra L. Rev. 590, 621–22 (1980). The theory's implications, however, determine what is fact for the purposes of the model, and consequently always test out in agreement because the assumptions underlying the theory dictate what the theory will or will not consider fact. Thus the model assumes that no qualitative judgments should be made about the rational choices being made by consumers and that the free exercise of those choices—snapshot by snapshot—is the value to be pursued without regard to the morality or wisdom of the choices made. Legal constraints upon the values being chosen or legal constraints upon institutions that affect the values being chosen are presumably not to be condemned in the absence of some showing that legal intervention will enhance the strange and peculiar definitions of "efficiency" and "consumer welfare."

This form of reasoning is totally at odds with our legal system. The common law process as it has been developed and is applied in this country is an inductive form of reasoning not a deductive one. It is called upon to analyze particular disputes in light of general principles and resolve those disputes peaceably in accord with the function of courts and our notions of justice. Making the process into one where a fixed model is applied with deductive reasoning to reality, such as that advocated by some economists (the Chicago-school advocates of economic analysis of legal issues in particular) short circuits the legal process. Values broader than those admitted by the model and facts that are not consistent with the assumptions of the model are ignored or are considered to be irrelevant. Inductive reasoning is suppressed on the altar of logical positivism. Moreover, non-quantifiable values are rejected as potential grounds for antitrust rules because admission of those kinds of values would destroy the symmetry and frictionless functioning of the model as well as interject discretion into decisions dealing with the real world. Such factors as an imbalance in bargaining power, the long-term/short-term consequences of particular practices, the maldistribution of wealth and power in society, the existence of forces undermining the rationality of consumers, the roles of time and causation in the analysis and imperfections in the market structure cannot be quantified and factored into the equation. Reliance upon social and political values in formulating what the law "ought" to be, is rejected because they are values considered unknowable by the inhabitants of a world where it is assumed that all that is worth knowing can be quantified and expressed mathematically. Hence, non-quantifiable values are ignored, and once ignored the proponents of "economic" theorizing in antitrust can blithely go along with their model and ignore reality and the factors that Congress and others consider to be uppermost in the development of antitrust policy. After all, they have "truth" and it is a "truth" which always tests out, because the model is both the condition for truth and its expression.

These underlying philosophical and methodoligical aspects of the Baxter-Miller approach to antitrust, dictate their positions on such questions as whether vertical price fixing should be declared *per se* unlawful, whether anticompetitive price discrimination does, in fact, take place in the economy and is worth worrying about, and whether the government should enforce a policy of protecting the right of individual entrepreneurs to carry on their business in accord with a competitive process or only be concerned with competition generally. In my judgment, it is not an approach that one should dignify by calling it "scientific", describing it as "empirical" or believing it to be the epitome of rational and productive public policy making. Instead, it is an ideology based on a theology which any citizen is obviously free to believe, but a theology that does not equate with reality, that does not conform to the values Congress has expressed in the antitrust laws, and one that would radically change existing antitrust policy and the goals which many believe the antitrust laws should promote. I do not wish to be understood as criticizing or making light of another's political or religious convictions. Each system of belief usually has a grain of truth to it or some insight worthy of serious consideration by anyone seriously groping for truth and the policy which best serves the public interest. I have no doubt in the integrity or honesty of the Administration or Messrs. Baxter and Miller; nor in the sincerity with which they hold their beliefs. Money supply, marginal tax rates, and the values wrapped up in neo-classical economic analysis are all relevant in some degree to the solution of our economic problems. So too are equity considerations, the realities of wealth distribution, the allocation of power in society, the implications of changing institutional structures, the realities of consumer behavior, the function of law as a basic expression of our moral values, and a host of other variables as well as the insights of many other academic disciplines. We get in trouble and public policy falls off the track, when only one factor is declared to be the exclusive one defining what the law ought to be, or what level of taxation is appropriate, or what degree the money supply should be shrunk or increased. Our problems are relational and multi-dimensional; not detached and sequentially applied panaceas temporarily popular.

The Baxter-Miller theology attempts to dictate a single goal for antitrust policy and a single way to achieve that goal. It is intolerant of conflicting or alternative solutions, because it is a theology which has become an ideology. In turn, it is an ideology which canot tolerate tampering with its fixed and rigid assumptions lest that the entire edifice comes tumbling down. As the late Arthur Leff observed about this mode of thinking: "If you think you know what's going to happen when you vary 'your' variables, you're a booby." (Leff, "Some Realism About Nominalism," 60 Va. L. Rev. 451, 476 (1974).) Proponents of neo-classical theorizing dictating antitrust policy are not "boobies", but they are advocates of a form of tunnel vision. Like the tunnel vision of supply side economics and the monetarists it is rapidly being recognized as inadequate to the tasks the law confronts. It is a theology and ideology that has seen its day—however brief—in my judgment. I agree with the observation of a distinguished legal historian Morton Horowitz:

"I have the strong feeling that the economic analysis of law has 'peaked out' as the latest fad in the legal scholarship in that it will soon be treated by the historians of legal thought like the writings of Lasswell and McDougal. Future legal historians will need to exercise their imaginations to figure out why so many people could have taken most of this so seriously." Horowitz, Law and Economics: Science, Politics, 8 Hofstra L. Rev. 905 (1980).

All these observations are basically philosophical ones, but very practical ones. They undermine the entire approach advocated by the Baxter-Miller viewpoint. Becuase the assumptions underlying the model do not comport with reality, the model does not; because the methodology by which the model is employed is rigidly deductive and the methodology of law cannot be so, its use in law does not conform to the functions of law; because its values do not equate with those which the courts have mandated for antitrust policy, it cannot be made the exclusive predicate of that policy. (For a similar criticism of Mr. Baxter's application of economic analysis to environmental policy in his book "People or Penguins: The case for Optimal Pollution" (1974) see Roberts & Stewart, Book Review, 88 Harv. L. Rev. 1644 (1975). Were this not enough, most of the observers of the antitrust scene subscribe to the view that Congress when it passed the antitrust laws mandated the implementation of broader social and political concerns as well as ones we could label economic concerns. The vast majority of qualified historians and students of antitrust who have investigated the matter all arrive at the conclusion that Congress was concerned with values far beyond the peculiar narrow and limited values subscribed to by the proponents of economic "efficiency" as the sole goal of antitrust. See generally, W. B. Letwin, Law and Economic Policy: The Evolution of the Sherman Antitrust Act (1966); H. Thorelli, The Federal Antitrust Policy—Organization of an American Tradition (1954); Pitofsky, The Political Content of Antitrust, 127 U. Pa. L. Rev. 1051 (1979); Schwartz, Justice and Other Non-Economic Goals of Antitrust, 127 U. Pa. L. Rev. 1076 (1979). Consequently, evern if one were to subscribe to the neoclassical approach to antiturst policy as the wise course to be implemented and one that could be implemented sensibly, they would still be confronted with the reality that Congress has mandated otherwise. Congress has mandated that the antitrust laws be used to implement political and social values as well as economic ones. Professor Eleanor Fox has summarized this view in a significant article entitled The Modernization of Antitrust: A New Equilibrium, 66 Cornell L. Rev. 1140 (1981). Professor Fox states:

"As history teaches, 'efficiency' is not the reason for antitrust. Indeed, those who value efficiency more than competition opposed the antitrust bills on grounds that they would constrain some activity that might save costs for a producer and forbid some activity that does not interfere with optimal allocation of resources. Rather than standing for effeciency, the American antitrust laws stand against private power. Distrust of power is the one central and common ground that over time has unified support for antitrust statutes. Interests of consumers have seen a recurrent concern because consumers have been perceived as victims of the abuse of too much power. Interests of entrepreneurs and small business have been a recurrent concern because independent entrepreneurs have been seen as the heart and lifeblood of American free enterprise, and freedom of economic activity and opportunity has been thought central to the preservation of the American free enterprise system." 66 Cornell L. Rev. 1153–54.

Professor Fox reaches a position similar to one that I have stated in an article entitled "Rethinking Sherman Act Section 1 Analysis: Three Proposals for Reducing the Chaos," 49 Antitrust L. J. 1593 (1982). That position is one which encapsulates the goal of the Sherman Act and the other major Federal antitrust laws as being the "preservation of the competitive process"—rather than the preservation of "competition." The distinction is a significant one. As Professor Fox states:

"One overarching idea has unified the three concerns (distrust of power, concern for consumers, and commitment to opportunity for entrepreneurs): competition as process. The competition process is the preferred governer of markets. If the impersonable forces of competition, rather than public or private power, determine market behavior and the outcome of power is by definition disbursed, opportunities and incentives for firms without market power are increased, and the results are acceptable and fair. Some measure of productive and allocated efficiency is a byproduct, because competition tends to stimulate low cost production and allocate resources more responsively than a visible public or private hand." (66 Cornell L. Rev. 1154.)

In an article entitled "The Function and Dysfunction of Per Se Rules in Vertical of reason analysis, I expressed the same thought in the following manner:

"The issue is a qualitative one of measuring the impact of the conduct on the ideal of a competitive process in the context of the particular industry or trade and in light of the political, social and economic purposes for relying on the competitive process as the rule of trade. The issue is not a quantitative one of determining how much competition is effected or destroyed by the practice, although power relevant market and quantitative effect may aid in determining the qualitative impact in some limited circumstances.

"The basic duty imposed upon those engaged in trade or commerce is to avoid displacing the competitive process by collaborative action in violation of Section 1 or displacing the competitive process by a unilateral or conspiratorial exercise or possession of monopoly power or attempt to monopolize in violation of Section 2 of the Sherman Act.

"A corresponding right to be protected from the risks of a displacement of the competitive process is vested in competitors and consumers injured in their business or property by an unreasonable displacement of the competitive process in violation of Sections 1 and 2 of the Sherman Act under Section 4 of the Clayton Act." (49 Antitrust L. J. 1610–11, 1623–25.)

In an article entitled, "The Function and Dysfunction of Per Se Rules in Vertical Market Restraints," 58 Wash. U. L. Q. 768 (1981) I put the matter this way:

"The general purpose of the antitrust laws is to protect and maintain the competitive process from unreasonable displacement by contracts, combinations, and conspiracies or by the unreasonable exercise of possession of monopoly power. This general purpose is designed to serve social, political, and economic goals. Even those who believe that the goals of the law are purely 'economic,' cannot escape moral, political, and social considerations in making their choice, giving it meaning, or applying the choice to factual controversies. The policies, however, behind choosing the competitive process as our fundamental method for governing economic activity in the private sphere always have been viewed as achieving goals broader than a materialistic measure of economic 'efficiency'. Those goals are limited not only to the narrowly defined and peculiar concepts of maximization of 'efficiency' and 'consumer welfare', but also include, inter alia, the goals of insuring that individual entrepreneurs succeed or fail on the competitive merits and not by the dictates of conspiracies of others who unreasonably displace the competitive process, maximizing intelligent consumer choice, disbursing undue economic power, and subjecting private power to the discipline of the competitive process in place of affirmative government regulation." (58 Wash. U.L.Q. 779.)

The Chicago School advocates of economic analysis of antitrust issues generalize the goal of antitrust as the preservation of "competition" in a general quantitative sense. Therefore, unless a particular agreement or unilateral act restrains competition in the broad quantitative sense there is no violation of the law. The law is not seen as a guarantee to each individual in the economy to operate their business or engage in consumer activities under a regime of competition. They see its function as only the elimination of output restricting activity particularly where such activity is mandated by Government regulation. Private displacement of the competitive process in individual cases is not a concern in the absence of a showing that the activity restricts output generally. Thus, for example, a conspiracy to exclude an individual entrepreneur from the market, is not actionable under this line of thinking unless one can also prove competition in the entire market is destroyed or injured by the conduct. Most courts have not taken this approach but have generally held conspiracies aimed at displacing the competitive process in ways which fix prices or exclude a competitor are per se unlawful.

An analogous situation, which might help one understand this distinction between competition and the competitive process, is to consider the standards courts apply in first amendment cases. The first amendment is seen as a guarantee of individual free speech. If the Baxter-Miller approach were applied in first amendment cases, before a citizen could complain that the state has illegally interfered with first amendment rights the citizen would be required to prove an injury to the first amendment rights of the general community as a result of the denial of them to a single individual. Under my line of analysis that injury would be presumed because the first amendment is an individual guarantee as well as a collective one. The same may be said for the Sherman Act, the Clayton Act and the Robinson-Patman Act. In both the legislative history and on the face of the statutes, it is apparent that Congress intended that they be interpreted as a guarantee to each individual that their rights in the economics sphere would be determined by the competitive process. The fact that a particular restraint does not injure "competition" generally, does not preclude the use of antitrust policy to rectify a denial of the competitive process to a single individual. See *Klors, Inc.* v. *Broadway Hale Stores, Inc.*, 359 U.S. 207 (1959). Protection of the competitive process serves goals broader than simply economic "efficiency" and "consumer welfare" as defined by the narrow constraints of neoclassical economic theorizing. It includes protection of such values as innovation, individual economic freedom, the contribution of consumer and distributor competitive effort to society's economic performance as well as that of sellers, the protection of economic and social freedom from undue exercises of power, and the dispersion of economic power in our society among all levels of the economy. None of these goals can be explicitly protected if one adopts the Miller-Baxter approach; indeed, most would fall by the wayside as a result of benign neglect. Rather, seller decisions are seen as a surrogate for all of them and the test for illegality is whether a particular practice injuries competition generally by reducing output. Coming at the question from the other direction permits courts to implement explicitly these other values Congress has mandated be fulfilled by antitrust policy. Rather than being lost in the cracks, between protection of competition and protection of the competitive process, the approach I advocate would permit courts to implement explicitly these other goals of the antitrust laws, as well as output restricting activity injuring "competition," in cases where injury to competition generally could not be proved. The Baxter-Miller approach would not permit protection of these values in the absence of some proof of injury to competition generally, bringing us closer to "a nation of clerks" which Justice Douglas maintained "is anathema to the American antitrust dream." *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 543 (1973).

II

A. Current enforcement policy—vertical restraints

These underlying philosophical assumptions are the basis upon which the administration reaches the results that it does and explain the underlying reasons why many antitrust commentators and the courts disagree with the Administration's philosophy of antitrust enforcement. Under current Administration policy most vertical market restraints, restricting the freedom of traders and of consumers to "maximize their utilities," rationally are seen as presumptively lawful. These include vertical price fixing, vertical territorial restraints, vertical customer restraints, and most forms of price discrimination. Elsewhere I have summarized the analysis which leads to these conclusions as follows:

"If one begins with the proposition that the goal of antitrust policy is to maximize 'consumer welfare' as defined by the fixed models of one brand of economic theorizing and the imaginary workings of a perfectly competitive market, which only permit a minor premise on factual assumptions in accord with the assumptions of the major premise but not necessarily in accord with unvarnished reality, the operations of deductive logic dictate the conclusion: only those restraints that quantitatively displace the market and impair consumer welfare are unlawful under the antitrust laws because all others are either promoting consumer welfare or will be efficiently remedied by the functioning of the perfectly competitive market. Q.E.D. It is a conclusion however, we cannot claim as true or false or right or wrong because the conclusion is assumed in the predicate. It is the logical fallacy of affirming the consequence. If the factual and legal postulates of the syllogism are either not true or not true in all circumstances, then the worth of the conclusion is worthless or nearly so. If the facts of the dispute do not comport with the assumptions of fact and value of the model governing the decision of the case, the decision is also misleading." (58 Wash. U. L. Q. 772-73.)

The reality of most vertical market restraints is now shrouded in myths generated out of potentially worthwhile insights in the neoclassical model. Some explanation must be found to explain why and how sellers in a perfectly competitive market would impose such restraints. It must be an explanation which conforms with the "efficiency" and "consumer welfare" goals of the theology. Out of the fertile imagination of the theoreticians has been born the "free rider," a villian denying to consumers repair services, warranty work, fancy showrooms and the other imaginary "benefits" of non-price competition. "Free riders" are seen under every rock or are assumed to be a potential evil justifying every restraint. The ill-defined concept of "free rider" is apparently attached to buyers not abiding by any goal a seller seeks to achieve by a vertical restraint. The theology condemns "free riders" as a plague and their rights and rationalities as beyond notice by the law. While there may be particular circumstances where it is wise or essential to sacrifice buyer and consumer freedom to compete in order to promote the public interest, such cases do not justify a presumption of legality for all vertical restraints, nor do they necessarily require the abandonment of legal control of the arrangement. The Baxter-Miller approach goes too far in the direction of presuming such restraints lawful. Exclusive weight is given to assumptions about the rationality of sellers but not the rationality of buyers and consumers entangled in a vertical restraint. Time and power are ignored in the analysis, along with market imperfections and countervailing social and political values inevitably involved in assessing facts unique to the dispute and in implementing the values of the law. Unjustifiable vertical restraints can only be explained by the assumption that there must be horizontal collusion lurking in the vicinity. The possibility that those imposing the restraints are acting in ways contrary to the assumptions of the model or that the law ought to be concerned with goals and values not allowed by the model, are possibilities that the theology cannot tolerate lest the entire edifice will crumble.

It is a form of the long discredited process of decisionmaking by hypotheticals and ruminations about what would happen in the unreal world of the model. Postulating the existence of a mythical villain denying the fruits of seller largesse to the public, like sitting up the straw men of a "missile-gap" or "communist conspiracy," can do wonders for an ideology in trouble. The hypothetical straw man can be used to justify the ideology's preference for protecting private power, the economic status quo and privilege while warding off the enemy of government intervention to redress the imbalance of bargaining power and the inequity of vesting control of buyer freedom in the hands of sellers. Hypotheticals and ruminations about imaginary "free riders" are substituted for the complex, empirical and realistic analysis by the legal process of the facts and circumstances unique to the case and for the complex goals that Congress mandated be implemented under the antitrust laws.

Because I began with a broader set of goals and values intended to be achieved by the competitive process, I reach different results with regard to vertical price fixing, vertical territorial and customer restraints, and the wisdom of restraining by law some forms of price discrimination. With regard to vertical price fixing, it is my position that vertical price fixing ought to be presumptively unlawful—per se unlawful in the jargon of the antitrust lawyer. The Baxter-Miller approach cannot reach that conclusion because they assume the existence of a perfectly competitive market. They further assume that when vertical price fixing is imposed by a rational seller and there is no horizontal collusion, it is a decision dictated by a market operating under the inexorable forces of perfect competition. In the interview published in The Washington Post on August 13, 1982, Mr. Baxter states that he believes that certain forms of vertical price fixing should not be declared per se unlawful. He would permit manufacturers of technologically complex products to dictate resale prices despite the long-standing prohibition of such a practice and the reaffirmation of that prohibition by Congress when it removed the fair trade exemption. Mr. Baxter would do so in the belief that a manufacturer of such products would only impose the restraint where it was necessary to prevent "free riders." The "free riders" imagined in this circumstance are firms that would cut prices and not provide service for the product. The fact that consumers or retailers exercising their rational judgment may wish to have the freedom to purchase from sellers not providing the service is given no weight. Instead, the decision of the seller would be imposed on buyers and retailers on the assumption that the seller is subject to perfectly competitive market pressures and that the seller's judgment therefore, is a reliable surrogate for the public interest in these circumstances.

Mr. Miller apparently holds similar views. In his dissent in the recent *Russell Stover* case, 43 A.T.R.R. (B.N.A.) p. 135, 166 (1982), a case challenging resale price maintenance imposed by coercive refusals to deal, Chairman Miller stated he believed vertical price fixing—like vertical customer and territorial restraints—ought to be measured by "rule of reason" rather than a test of per se illegality. Presumably, Mr. Miller is willing to accept the practical consequences of applying a "rule of reason" to vertical price fixing—it would be per se lawful despite the shaky economic justifications for the rule, Supreme Court rejection of the argument for it, and Congressional action mandating otherwise. The experience with fair trade inflating most resale prices and the increasing evidence that non-price competition tends to generate inflation, see W. D. Slawsen, "The New Inflation: The Collapse of Free Markets" (1981), deserves no consideration. Nor does the underlying paternalism of assuming seller rationality is a sufficient surrogate for the collective rationality of all decisionmakers in the marketplace justify giving sellers discretion to impose their view of the world upon other "rational maximizers." Mr. Baxter's imaginary "free riders" justifying a restraint on price is wholly unnecessary even in the circumstances he postulates. The seller can simply restrict the distribution of their products to buyers they have confidence in if they wish to have point of sales services provided. So long as there is no conspiracy with others, a seller remains free to choose those with whom he will deal. In this way the objective, if there is a legitimate objective, of the seller insuring that significant point of sale services are provided can be achieved without the unilateral repudiation of Supreme Court precedent, the undermining of the congressional mandate in this area, a rebirth of resale price maintenance, and the overall undermining of the goal of protecting the right of all entrepreneurs and consumers to contribute their competitive effort to the general welfare.

In the area of vertical customer and territorial restraints, the neoclassical position has been adopted by the U.S. Supreme Court in the case of *Continental T.V., Inc.* v. *GTE-Sylvania, Inc.*, 433 U.S. 36 (1977). Considerable controversy has arisen with regard to the Court's approach in that case. In my view the *Sylvania* case adopts too broad a standard of legality for vertical customer and territorial restraints, just as the *Schwinn* case it overruled, adopted too rigid a standard of per se illegality probibiting such practices. Moreover, the Court failed in *Sylvania* to establish a rational test for deciding the legality of such restraints in particular cases. Instead the Court simply suggested that a "rule of reason" approach should be applied to vertical customer and territorial restraints. This has caused former Federal Trade Commission member Robert Pitofsky to state:

"There is no existing analytical framework for applying a rule of reason generally, and certainly none for applying it to vertical non-price restraints. The technique of the *Sylvania* majority—quoting a long list of factors without any indication of priority or weight to be accorded each factor—unfortunately is standard operating procedure." (Pitofsky, "The Sylvania Case: Antitrust Analysis of Vertical Non-Price Restraints," 78 Colum. L. Rev. 1, 34 (1978).)

Other criticisms of the Court's *Sylvania* approach include the view that it is wholly unrealistic to assume that perfectly competitive markets do in fact exist. It should be assumed in many cases that vertical restraints are an expression of market power, not a competitive process. Under this view it is claimed the market is not one governed by consumer sovereignty, but it is a market managed by powerful firms operating in concentrated industries with the power, motivation and means (advertising) to manipulate demand. In such a world it is argued, it should not be presumed that manufacturers institute vertical restrictions to increase efficiency, lower marginal costs, increase profits, promote point of sale service, and promote consumer welfare. Rather, such restraints should be presumed to be means for promoting artificial product differentiation based on advertising and promotional gimmickry and an exercise in market power causing consumer prices to rise, and thereby stimulating interbrand nonprice competition insulating manufacturers from interbrand price competition. In these circumstances, vertical customer and territorial restraints, may well be devices for promoting the self-interest of sellers in higher profits and freedom from competition, rather than promotion of the overall public interest. Consequently, it is argued vertical nonprice restraints should also be presumed to be unlawful along with vertical price fixing. As I shall explain later, this is a position I agree with, but one which requires a modification of the traditional views about the per se rule of reason distinction to take account of rare circumstances where some vertical restraint may be necessary to protect or promote the public interest.

B. The Robinson-Patman Act

With respect to the Robinson-Patman Act and the prohibition upon price discrimination, I come here not to praise the Robinson-Patman Act without reservation or to condemn it without reservation. The Baxter-Miller approach to Robinson-Patman Act problems follows from their unswerving commitment to the neo-classical theology. Under that approach, it would be assumed that rational sellers would only engage in price discrimination for efficiency and consumer welfare objectives. This position is also premised upon the artificial and unrealistic assumption that markets are prefectly competitive. In such circumstances, a seller could not engage in price discrimination for anticompetitive reasons because other sellers would fill the void and provide goods or services to retailers or wholesalers on a more attractive basis. The market would also punish irrational price discrimination, by driving away customers from sellers who do so. Consequently, the market would correct itself and we should not use the law to interfere in the market's decisionmaking process that would take place naturally with regard to price discrimination.

The supporters of the Robinson-Patman Act take an equally religious viewpoint about its significance. The supporters of the Act see it as a bastion of small business, protecting small business from the predatory and otherwise arrogant practices of large business competing with them and of powerful suppliers dictating to small business to whom they may sell, where they may sell and at what price they may sell. Small business sees the Act as their only defense against these kinds of practices. Many in the small business community go so far as to say the Robinson-Patman Act is the only means for insuring their very survival. Thus, when a small retailer is competing with the chain store and the chain store is able to obtain goods that it sells in competition with the small retailer at a lower price, the small retailer believes he is the victim of undue discrimination which will ultimately destroy him. In some cases the small retailer is correct; and in others, the lower price to the large retailer may be the expression of the competitive process working rather than the process being unreasonably subverted. Nevertheless the small retailer believes that this kind of discrimination with the potential of destroying his business, whatever its relation to the competitive process, is unfair and unjust. That clearly was the purpose of the Congress which adopted the Act, and the continued congressional support for the Act rests upon its appeal to equity and fairness even where there is an obvious sacrifice of purely economic benefits in particular cases. Consequently, small business groups bring a religious fervor to the discussion of the wisdom and enforceability of the Robinson-Patman Act. It is a religious fervor in defense of the Act that is only equaled by the religious fervor of neoclassical economic theorizers in attacking the statute.

Unlike those who condemn the Act and these who praise the Act without reservation, I come down somewhere in between. To the Chicago School purists, I would suggest that price discrimination undermining the competitive process does, in fact, take place. In many of the industries that I have been involved with, particularly in the marketing of petroleum products, widespread and unjustified price discrimination takes place. This is particularly the case with regard to dual distributors, distributors who both supply products to retailers and who also engage retailing themselves. I am familiar with several instances where refiners selling directly at retail through wholly-owned outlets are pricing their product at their retail outlets at or below the wholesale price they charge independent distributors. I have investigated such instances and can find no cost savings justifying such a blatant form of discrimination. Nor is it a practice likely to be cured by the market, because retailers have no alternative sources of supply and entry is unlikely given the nature of the business. It is obviously the product of localized power in the distribution of gasoline products enabling powerful distributors to force independent retailers into pumping gasoline at slave labor rates—namely, at a loss. Most retailers have no other choice because they have no other source for product, entry is impossible, and dealers are locked into their stations. I have had several reports of similar practices elsewhere in the country from attorneys familiar with gasoline marketing. Other forms of unjustified and anticompetitive price discrimination regularly take place in industries characterized by an imbalance of bargaining strength. It is usually the product of powerful buyers or sellers demanding or enforcing price differentials for the purpose of disciplining competitors, exploiting vulnerable retailers, or excluding retailers or competitors from the market.

In a recent case, *Dimmitt Agri Industries, Inc.* v. *C.P.C. International, Inc.*, 43 A.T.R.R. 195 (July 15, 1982) the Fifth Circuit was confronted with a case involving price discrimination in the national corn syrup market. It was a replay of the old price discrimination practices of Corn Products Refining litigated in 1916 in the case of *United States* v. *Corn Products Refining Company,* 234 Fed. 964 (S.D., N.Y., 1916). C.P.C., the successor corporation to Corn Products, was again charged with using low prices in one market supported by high prices in another market to drive out competitors. The Fifth Circuit held that the action could not be maintained as an unlawful monopolization case under Section 2 of the Sherman Act because C.P.C. did not have a sufficient market share for a monopolization case. The case, however, was remanded for further trial on the question of the legality of the practices of C.P.C. on an attempt to monopolize theory and on a price discrimination theory. Other similar cases of recent note have been Borden, Inc. (Realemon) and CCH Trade Reg. Rep. section 21,194 (F.T.C.) and *William Inglis & Sons Baking Co.* v. *ITT-Continental Baking Co., Inc.,* 652 F.2d 917 (9th Cir., 1981). In the rarified world of abstract economic theorizing, these kinds of cases simply cannot happen. They cannot happen because the model assumes that the market is perfectly competitive and there is no power—in the absence of a monopoly—in the hands of sellers to deviate from the rational demands of the market with regard to their pricing practices. Regional market power, the power obtained by successful product differentiation, imbalance of power, advertising and other factors that exist in the real world are simply ignored. If one begins with the unreal and abstract assumptions of the model, then one must inevitably conclude that price discrimination does not exist or that if it does exist, it is a form of competitive activity in response to rational market factors. If, on the other hand, one has some experience in the real world, it does not take long to appreciate the fact that market imperfections, market power, imbalances in bargaining power, irrational product differentiation, and other factors undermining any possibility of reality conforming to the assumptions of the model make anticompetitive price discrimination a not uncommon practice. Price discrimination in many instances cannot be legitimately judged by the abstract model, but must be judged in light of the realities of the particular industry and the circumstances involved in a particular case.

To those who would defend the Robinson-Patman Act without qualification, I would say that there is a range of price discrimination which is a reflection of the competitive process at work. Some of the forms of legitimate price discrimination are recognized by the provisos to sections 2A and 2B of the Robinson-Patman Act. They permit a difference in price which reflects differences in the cost of manufacturers sale or delivery resulting from the differing methods or quantities in which the commodities are sold to purchasers and they recognize a difference in price may be justified where it is necessary to meet, in good faith, an equally low price of a competitor. It must be admitted, however, that some of the complaints of small business about price discrimination are reflections of changes in methods of marketing which benefit the public by lowering costs and do not necessarily meet the technical requirements of the affirmative defenses. The original price discrimination law was aimed at practices of the type outlawed on monopolization grounds in *Standard Oil* v. *United States,* 221 U.S. 1 (1911) and *United States* v. *American Tobacco Co.,* 221 U.S. 106 (1911). The original Clayton Act Section 2 was aimed at preventing predatory pricing of the type followed in those cases, primarily geographic price discrimination aimed at primary line competitors and having the effect of driving them out of business. In those pre-Clayton Act cases, geographic price discrimination was engaged in by very powerful sellers with near monopoly control of markets so it could be attacked under section 2 of the Sherman Act. The original Clayton Act was adopted to nip such practices in the bud before full-blown monopoly power was achieved.

It is widely acknowledged that the 1936 Robinson-Patman Act amendments to section 2 were aimed at chain stores and the price and promotional concession chain stores obtained by virtue of their buying power and at preservation of independent brokers in the food and apparel industries. It reflected a desire to preserve independent distributors by protecting them from the development of chain store selling by sheltering them from what some believe is progress. The Robinson-Patman Act amendments are generally viewed by most objective observers as running contrary in some ways to the basic policies of the Sherman Act. Legitimate price competition is curbed along with the illegitimate. Many objective viewers have also maintained that the Act encourages price rigidity by requiring sellers to extend price cuts to all buyers if they extend them to a few. In concentrated markets sellers may not be willing to engage in price competition to take a part of the market away from a competitor because of Robinson-Patman Act difficulties. Others have suggested that new entrants may find it difficult to lawfully enter a market by way of price concessions in order to overcome the inertia of existing trade relationships. The new entrant may be unable to cut prices to a particular buyer in order to enter the market because of risks that the conduct may violate the Robinson-Patman Act. President Johnson's White House Task Force on Antitrust Policy, the Neal Report of 1968, also listed some other risks to competition that may be generated by the existence of the Act:

"The Robinson-Patman Act has impaired competition and the development of new methods of distribution and numerous other respects: By discouraging sellers from passing on cash savings to buyers it has impaired experimentation with possibly more efficient methods of distribution integrating wholesale and retail functions; by requiring proportionately equal treatment in certain promotional practices, it has discouraged experimentation with price-cutting methods which are equivalent to desirable types of price differentials; by prohibiting sellers from paying brokerage to customers or their agents, it has erected an artificial protective barrier around independent brokers and inhibited integration of brokerage functions."

While some of these observations are obviously opinion and speculation, they do identify risks we should be concerned with. Empirical investigation should be undertaken to determine whether they are real or only imaginary and whether the more appropriate response would be a program of deconcentrating those industries where possible.

It would appear that the basis value behind the Robinson-Patman Act in many of these cases is to sacrifice the competitive process in the name of equality of opportunity and fairness. That clearly was the congressional purpose when the Act was adopted and it is a purpose that those charged with enforcing the statute in this era are bound to carry out. It must be recognized, however, that in some cases pursuit of the equity concerns of the Robinson-Patman Act may collide with the competitive concerns of the Sherman Act and sorting out which concern should be promoted in a particular case is not a clear-cut or easy task.

Proponents and opponents of the Robinson-Patman Act must also face another reality. That reality is that the Robinson-Patman Act as a practical matter is inapplicable to a very large number of cases; cases involving anticompetitive price discrimination, as well as competitive pride discrimination which might be declared unlawful on purely equality of opportunity grounds. The reason for this state of affairs is that the courts have severely restricted the applicability of the Robinson-Patman Act in a number of ways. For example, the courts have interpreted the commerce provision of the Act as requiring one or more of the discriminatory sales to be across state lines. See *Gulf Oil Corp.* v. *Copp Paving Co.,* 419 U.S. 186 (1974). Price discrimination taking place wholly within the borders of a single state therefore, is beyond the reach of the statute. The statute also does not apply to services (only "goods or commodities") and the Supreme Court has recently held that the proof of damage requirement in private suits to enforce the statute means that a plaintiff must make some showing of actual injury directly and clearly attributable to the price difference. See *Truett Payne Co.* v. *Chrysler Motors Corp.,* 101 S.Ct. 1923 (1981). Prior cases had allowed a plaintiff to rely on the amount of the price difference as the measure of damage. The *Truett Payne* decision overruled this method of proving damages and imposed a standard of proof that is probably impossible to meet in most cases, with the plaintiff having to show the amount of injury attributable to the price difference rather than simply assuming the price difference equates with the damage suffered. Section 2(f) of the Act, prohibiting the inducement of a discrimination in price by a buyer, has also been limited by a recent decision. In *Great Atlantic & Pacific Tea Co.* v. *F.T.C.,* 440 U.S. 69 (1979) the Court held that the defense of meeting competition was available in a 2(f) action. In that case a powerful buyer had induced a seller, Borden Milk Company, to give a lower price in order to meet competition from another seller of dairy products. The Court held that the meeting competition defense was available to the buyer because it was available to the seller induced to give the discriminatory price. While I do not quarrel with the Court's analysis or result in that case, it is a serious limitation upon the effectiveness of Section 2(f) in restricting powerful buyers from inducing price discrimination in their favor by fair means or foul ones.

These practical limitations upon the applicability of the Robinson-Patman Act mean that it is very difficult to bring a case and win it where there is price discrimination that should be restricted by law, let alone price discrimination which should not be prescribed by the law. In the case of private litigation the feasibility of bringing a case is further limited by the realities of the cost of modern litigation. A small businessman victimized by illegal price discrimination, must not only overcome the technical legal hurdles of the commerce requirement, for example, but must also have a substantial amount of money in order to finance this highly complex litigation. No sensible attorney would consider taking any but the most blatant and clear-cut case without several thousand dollars "up front" to finance the litigation. Several of the same practical problems face the enforcement agencies. It is not surprising that there has been a significant decline in Robinson-Patman Act private litigation in the last decade and a substantial decline in the number of public enforcement actions by the federal agencies. The Act continues to have some vitality, however, because many businesses, wishing to abide by the law or fearful of expensive and time-consuming litigation, make substantial internal efforts to comply with the Act in their general marketing practices. I have advised firms concerned about complying with the Robinson-Patman Act for advice in establishing a compliance program. In some instances, unjustified but unintentional price discrimination has been avoided as a result. With the current attitude of the Administration enforcement officials, however, it would seem likely that many firms would simply abandon such efforts because the enforcement officials are obviously unwilling to enforce the statute. Consequently, I would expect to see substantial price discrimination beginning to take place, because there is no meaningful threat from private litigants bringing a successful suit in most instances and the government responsibility to enforce the statute has been reduced to a paper tiger no one need fear.

Whatever one might think about the merits and practicalities of the Robinson-Patman Act, it is however clear that Congress' intent in passing the statute was to protect small business from the power and influence of large businesses either engaging in price discrimination or inducing it. Congress made the choice despite risks to the competitive process. Thus, the current enforcement posture of the Justice Department and the F.T.C. with regard to the Robinson-Patman Act is in conflict with the expressed Congressional intent that the statute be enforced and that it be enforced in a way that promotes equity and equality of opportunity in the marketplace despite the theoretical conflicts with the Sherman Act. For enforcement officials to reject the responsibility of enforcing the statute, is clearly an assumption of legislative functions. If they do not like the statute and believe it should be substantially altered or amended, their responsibility is to come to the Congress and ask Congress to adopt their views. It is not their function to unilaterally repeal statutes that Congress has adopted by a policy of benign neglect and absolute hostility to the law they are sworn to uphold. If it is a matter of conscience with them, they should seriously consider resigning the office, because they no longer are following the oath that they took when accepting appointment to the office.

III

It is not enough to throw rocks at the philosophical underpinnings of the Baxter-Miller approach to antitrust enforcement or simply take ideological issue with them, pointing up obvious shortcomings with regard to the public interest of following their logic to its inevitable conclusions. Nor is it sufficient to point up the arrogance of enforcement officials assuming that they have the unilateral authority to repeal statutes adopted by Congress or to refuse to enforce the policies that the courts and Congress have declared should be implemented by enforcing the antitrust laws. Serious as these questions are, there are substantial difficulties and policy questions with regard to how the antitrust laws should be enforced in late 20th century America. Unwise enforcement policy is just as bad as refusing to follow the clear-cut mandates of Congress and the courts. Some of our current economic difficulties I believe are attributable to the failure to wisely and adequately enforce the antitrust laws during the past two or three decades. If one surveys the wreckage of our economic landscape, it is apparent that many of the major industries which are in more difficulty than the others racked by inflation are ones that have been characterized by substantial economic concentration during the post-World War II period. For the past twenty years committees of Congress, most notably the House and Senate Antitrust Subcommittees have engaged in extensive surveys of economic concentration in industries like autos and steel. Those hearings before the antitrust subcommittees indicated that the levels of economic concentration in autos and steel were much above what was necessary for economies of scale. Warnings were put forth that the absence of competition in those industries was dangerous and would ultimately lead to adverse consequences for the public interest. We are currently paying for those consequences. The invasion of the American markets by foreign producers, particularly producers in Japan where there are several more auto companies than there are in the United States, exposed the long-term consequences of a failure to maintain a competitive market structure in our basic auto and steel industries. Our companies had been allowed to become fat, inflexible, sloppy, content with the status quo and incapable of rapidly responding to changing circumstances and a new economic environment in the seventies. (See, "Battered by Imports, Car Makers Get Serious About Raising Quality," W.S.J. p. 1, col. 1 (Aug. 26, 1982).) Large shares of the American market were grabbed off by smaller and more competitive foreign producers because the American companies were not responsive to consumer demand; they were accustomed to manipulating and controlling that demand while producing inferior products. While one may argue that the forces of competition ultimately worked their way in these instances, the severe economic damage done to our economy and those regions of the country now suffering the consequences are a horrible and unnecessary price to pay. Those were instances where the intervention of the legal system some ten to twenty years ago may well have avoided the terrible costs we are now paying in the form of unemployment and companies threatened with collapse.

One could multiply the instances of a failure to adequately enforce antitrust policy and modernize the laws in this area contributing, in part, to our current economic circumstance. I believe one could also make a strong case for the proposition that the changes in the law that have been occurring at the urging of the neo-classical ideologists are also contributing to such factors as inflation in the economy and that it is contributing to the demise of small business in record numbers. While not the exclusive cause of either of these factors, the current policy of non-enforcement against vertical restraints, including vertical price restraints, will shift even more the emphasis in the marketplace from one of competition on price to one of competition on non-price factors. Not all non-price competition is evil but much of it contributes to higher consumer costs and to the attempt to manipulate consumer demand by advertising, artificial product differentiation, and other gimmicks that contribute little to our overall economic well being. Price competition can sort out worthwhile non-price competition from that which is not. Adverse social effects of current enforcement policy may also be taking place. Small business finds itself defenseless against the undue exercise of power in the economy, the historic and central concern of the antitrust laws. The innovation and competitive contribution of small business, often cited as the primary source of innovation and competition in the economy, are subjected to the dictates of powerful buyers and sellers telling small business where they may sell, to whom they may sell, at what price they may sell and sometimes whether they may remain in business at all. Where not clearly justified, the exercise of such power is just as objectionable as government power doing so. The refusal to interject antitrust policy into the equation means that the less powerful have no counterweight to the exercise of undue power by the powerful in the economy and that we sacrifice the competitive contribution of the small on the altar of an unjustified presumption in favor of bigness or an unrealistic blindness to power in the economy.

In response to this current state of affairs I would make several recommendations, some legislative and others requiring a change in the basic emphasis of enforcement policy. Those changes briefly stated are as follows:

(1) It should be made clear that the basic purpose of the antitrust laws is to guarantee that everyone engaged in economic activity in this society, to the maximum extent possible, is entitled to have their success or failure governed by a "competitive process." "Efficiency," particularly the strange concept associated with neoclassical economics, is not the reason for antitrust. Rather than antitrust standing for this artificial and unusual concept of "efficiency," the American antitrust laws were passed and have been enforced as a means for controlling and dispersing private power. The antitrust laws are the analogy to the Bill of Rights in the private sphere, acting as a check upon the arbitrary and qualitatively anticompetitive exercises of power displacing the competitive process. I agree with Professor Eleanor Fox when she says:

"There are four major historical goals of antitrust, and all should continue to be respected. These are: (1) dispersion of economic power, (2) freedom and opportunity to compete on the merits, (3) satisfaction of consumers, and (4) protection of the competition process as market governor. A fifth possible goal of antitrust is the preservation of small size for its own sake. Because of the unusual potential for conflict between this objective and consumers interests, I do not propose incorporation of this goal into antitrust policy. A sixth possible goal, justice, is vague in conception and is, in fact, a byproduct of several more specific goals. I therefore do not treat this value separately." (Fox, "The Modernization of Antitrust: A New Equilibrium," 66 Cornell L. Rev. 1140, 1182 (1981).)

Adoption of this philosophy would require a shift in the philosophy of the enforcement agencies, a shift I do not expect to see happen so long as Mr. Baxter and Mr. Miller are in charge of the enforcement agencies. It is, however, the basic philosophy mandated by Congress and the courts, and one that the committees of the Congress should insist that these enforcement officials follow or that other leaders of the agencies be found who will do so. The continued failure to do so will mean the accelerating demise of small and medium-sized business with their contributions of innovation, price competition, efficiency, independence and flexibility. This is not a policy requiring atomization of large firms or one that assumes "big is bad." I do not favor destruction of economies of scale where they are clearly required, nor do I assume the large to be evil or necessarily inefficient. On the other hand, it must be recognized that large-sized firms often possess power and often are characterized by large and unwieldy bureaucracies—just as big government has power and inefficient and irrational bureaucracies. Antitrust is a necessary constraint upon power in the private sphere and an activist enforcement policy aimed primarily at that power, as well as output restricting practices, is essential for our economic well-being. It carries with it the promise of the competitive process sorting out optimum scale, efficient structure, worthwhile innovation from that which is not, and the proper measure of economic freedom, punishment, and reward in the private sphere.

(2) My second proposed reform is one that must be implemented by the courts. It would require the courts to see as the basic purpose of Section 1 of the Sherman Act the protection of the competitive process in a qualitative sense and to view the per se rule of reason dichotomy as a single form of analysis establishing evidentiary presumptions of whether of not the statute has been violated by an unreasonable displacement of the process in particular cases. The current approach of the courts is to treat the per se and rule of reason concepts as establishing separate categories of hard line rules and the function of the courts as one of pigeonholing specific conduct within or outside a per se rule or as conduct subject to an undefined rule of reason analysis. This process has made antitrust litigation highly artificial and legalistic. It has come to resemble tax court litigation, where great effort is expended on exploring arcane minutiae and law becomes a religious dogma divorced from its moral ends. As a result, the litigation process has become highly expensive, complex and drawn out—far beyond what is required to fairly adjudicate the competing values involved in a particular case. In part, this state of affairs is attributable to the legalistic, complex and abstract state of current antitrust doctrine—a state of affairs needlessly complicated by excessive warfare over irrelevant and abstract economic theorizing. While economic analysis is relevant to an understanding of the industry involved and sometimes the practical consequences of judicial intervention in a particular case, it has become blown out of any realistic proportion in many cases. For example, the function of "power" in tying analysis should be limited to identifying the existence of a tie in cases where the transaction might be a voluntary one of mutual convenience. (See Bauer, "A Simplified Approach to Tying Arrangements: A Legal and Economic Analysis," 33 Vand. L. Rev. 283 (1980).) In a recent case applying an injury to "competition" philosophy however, in re *Data General Corp.* antitrust litigation, 529 F. Supp. 801 (D. N.D. Cal. 1981), the Court required proof that coercive tying injured "competition in a relevant market" before a violation could be found. The inquiry is an expensive, time consuming, and irrelevant one because the essence of unlawful tying is the exercise of power displacing the competitive process—not the destruction of competition generally in a relevant market.

A similar misunderstanding of the primary goal of antitrust policy has provoked a split in the circuits in vertical conspiracies to terminate a price cutting distributor. These cases usually occur where retailers complain to a supplier about the price-cutting or other competitive tactics of a retailer. When the supplier goes along with the complaining retailers and cuts off the price cutter, does the victim have an antitrust claim in the absence of proof of an injury to competition generally? In *Cernuto* v. *United Cabinet Corp.*, 595 F.2d 164 (3rd Cir. 1979), the Court upheld an antitrust claim, implicitly recognizing the purpose of the law as protection of the competitive process. In *Oreck* v. *Whirlpool Corp.*, 639 F.2d 75 (2d Cir. 1980), a different circuit rejected a similar claim, implicity holding the purpose of the law to be protection of competition generally—despite the effect upon the competitive process as it applied to a single firm. I agree with the *Cernuto* approach because it gives effect to the basic purpose of the law, while the *Oreck* decision denies firms protection from the anticompetitive exercise of power in the economy because it sees the law's function as protecting competition generally. Before the victim of such a restraint may recover, proof of injury to competition generally—an elaborate and expensive kind of economic proof—must be advanced, even though there is usually no general harm to short-run "economic efficiency" or any enhancement of it by the restraint.

Such a process of analysis has also resulted in the courts failing to implement the goals of the statute in light of the specific problems of individual cases. In an article entitled "Rethinking Sherman Act Section 1 Analysis: Three Proposals for Reducing the Chaos," 49 Antitrust L. J. 1593 (1982), I explained the significance of this change in approach as follows:

"We should think of both [per se and rule of reason analysis] as a single method of analysis for establishing or not establishing evidentiary presumptions allocating burdens of proof rather than a series of substantive rules with square corners capable of neatly dictating legal results whatever the facts, whatever the industry, and whatever the circumstances. To borrow a cliche from first year law school classes, per se and rule of reason analysis are tools—not rules. They are methods of analysis for determining whether the statute has been violated, not rubrics to be employed as the major premise of the syllogism in deductive logic to then dictate what facts will be required or allowed to make up the minor premise . . . . [S]ome of the presumptions would be conclusive in most cases while in others the presumption would merely shift the burden of proof of justification, defense, or excuse to the defendant once a particular category of conduct is shown. In still other cases there would be no presumption shifting the burden of proof, but an affirmative burden on the plaintiff to go forward with the evidence proving a contract, combination, or conspiracy unreasonably restrains trade."

Adoption of this reform would enable antitrust analysis to accommodate itself to serving all the goals of the law while still accounting for the complexities of modern economic institutions, marketing practices and litigation. For example, in vertical territorial and customer restraint cases the conduct should be viewed as presumptively unlawful because it is often the product of undue power by a seller or a buyer unnecessarily restricting the competitive effort of retailers; it has the effect of reducing intrabrand price competition; and, it frequently is an unnecessary infringement of the competitive freedom of the victim of the restraint. Under current law, the *Sylvania* opinion leaves the matter in a mass of confusion. There is no known standard for determining whether a particular use of vertical customer or territorial restraints is an "unreasonable" restraint of trade. For all practical purposes, such conduct is per se lawful. Under my proposal, the conduct would be presumed unlawful subject to a defense that the restraint is necessary in order to protect consumers (i.e., control marketing of a dangerous product), achieve some legitimate business objective that can be objectively weighed and evaluated (i.e., provide essential point of sales service), and is no more restrictive of intrabrand competition than is absolutely necessary.

(3) In accord with my proposed change of approach in Number 2, supra, I would classify vertical price fixing vertical customer restraints, and vertical territorial restraints as presumptively unlawful. In the case of vertical price fixing the presumption would be a particularly strong one, with very few, if any, exceptions to the rule. Using vertical price fixing in order to retrain the imaginary "free riders" that Mr. Baxter is apparently concerned with, is simply too great a restraint upon the competitive process, intrabrand price competition, and the freedom of traders and consumers to be tolerated. There may be some unusual cases where such an argument might be made, but I am aware of none that has been advanced or justified. If such a case should arise in the future, treatment of the per se rule as an evidentiary presumption should permit a court in a specific case to take account of any legitimate justification for the restraint. The Baxter approach would simply open wide the door to the widespread use of vertical price fixing because those subject to the law would have no fear of enforcement action brought by the government. Even if an action were brought, it would be subject to an extensive and expensive trial under the "rule of reason." That result is simply unacceptable and would only further encourage the interference with the independence of traders and the growing rigidity in pricing structures in the economy with higher prices to consumers in the long run. In the case of vertical customers and territorial restraints, a somewhat broader range of justification or defense may be permitted where, for example, customer restraints are necessary because of the dangerous nature of a product or territorial restraints are needed to induce a dealer to make a large capital investment necessary for the marketing of certain products. But such restraints should be no more restrictive than objectively necessary, a factor seldom weighed in the mass of confusion which now prevails in litigating a case under the ephemeral "rule of reason" standard mandated by *Sylvania.*

(4) With regard to the Robinson-Patman Act, I have several proposals. First, the Act should be enforced by the agencies charged with the responsibility of enforcing it so long as it remains on the books. Those agencies have enforcement discretion and can avoid the bringing of cases which collide too greatly with the philosophy of maintaining a competitive process. So far as I know, the basic law making function and choice among goals like equity and efficiency still belongs to Congress. We have not delegated that authority to self-appointed experts following their own ideological preferences. There are many cases of price discrimination which are anticompetitive. They do not present a conflict with the policy of the Sherman Act, control of undue power in the economy. The refusal to bring any cases at all is just as bad as a policy of bringing all potential cases without regard to harmonizing conflict where possible. Secondly, legislative reform of the Act is necessary. My suggested way of reforming the Act would be to amend the Sherman Act in exchange for repeal of the Robinson-Patman Act. An amendment should be proposed to Section 2 of the

Sherman Act, one which defines attempt to monopolize in the following way: "For the purposes of this Act, an attempt to monopolize shall include any unilateral conduct, done with the purpose and effect, unreasonably, of fixing prices or excluding a competitor." The amendment would require proof of both purpose and effect and that the conduct is unreasonable under the circumstances in order to provide a means for sorting out the procompetitive from the anticompetitive. Such an amendment would enable courts to develop standards to regulate that price discrimination which is an unjustified exercise of economic power injuring the competitive process and the rights of individual entrepreneurs to succeed or to fail by virtue of the competitive process. At the same time, price discrimination consistent with the operation of the competitive process would not be illegal. At present, there is a gap in the Sherman Act, because the statute does not permit an action against a firm with local or regional power unless that power is overwhelming and therefore is substantial enough to become an unlawful monopolization in the structural sense of overwhelming market share. Cases like *United States* v. *Empire Gas Corp.*, 537 F.2d 296 (8th Cir. 1976), cert. denied 429 U.S. 1122 (1977), would no longer escape legal control. In that case, a propane gas distributor in Missouri was engaged in a program of geographical price discrimination. The defendant raised prices in one town and cut them in the next driving out small distributors of liquid petroleum gas. The court held the action could not be maintained as an attempt to monopolize because the defendant did not have a substantial enough market share to equal monopoly power. The case could not have been brought under the Robinson-Patman Act because there were not two or more sales across state lines.

The amendment I propose would allow actions to be brought attaching unjust price discrimination, like that employed in *Empire Gas*, which undermine the competitive process or constitute the undue exercise of economic power in ways which are contrary to the historic purpose of the antitrust laws. The statute would be far less complicated than the Robinson-Patman Act and avoid the difficulties of the Robinson-Patman Act being limited by the "in commerce" standard and avoid the practical difficulties generated by the standard of proof necessary to show damage in a Robinson-Patman Act case. Services would also be covered. In my judgment, the amendment would allow courts to fashion, on a common-law basis, a series of standards by which we could isolate those forms of price discrimination which should be declared unlawful from those which should not. In addition, the amendment would close a gap in Section 2 of the Sherman Act where the unilateral exercise of economic power in ways that are destructive of the competitive process other than unjust price discrimination cannot presently be remedied under federal antitrust laws. If the amendment is not adopted however, I would leave the Robinson-Patman Act as is for the prophylactic value it still may carry and the possibility that future enforcement officials may more responsibly deal with it than the current course of ignoring it.

(5) Both Houses of Congress should hold extensive hearings on the overall policies of the antitrust laws. Of necessity, given the short notice that I had of these hearings, I have not been able to deal fully or fairly with all the issues raised by the subject matter of these hearings. Many others in the field, on both sides of the debate that you have heard me talking about, should be invited to give their views to the Congress. The issues involved here are simply too fundamental and have such far-reaching consequences to spend a few short hours listening to the views of a handful engaged in the debate. I would suggest that the objective of such a hearing should be the drafting of a "Statement of Purpose" to be inserted before the Sherman Act as a guide to its interpretation and implementation. The old Interstate Commerce Act had such a statement of purpose, called the "National Transportation Policy," which heavily influenced the interpretation and application of that statute. Interpretation and application of the antitrust laws could be substantially benefited by a similar declaration of congressional purpose inserted at the beginning of the Sherman Act, informing litigants, courts and commentators what Congress expects these laws to achieve. Needless to say, I would urge that the statement of purpose framed by Professor Fox and quoted supra, should be the one Congress adopts. The congressional purpose would thereby be clear and no longer could enforcement officials renounce their responsibility to fulfill that purpose by appeals to an ideology inconsistent with the law's ends or by reference to transparent rewrites of history distorting the purpose of the law.

CONCLUSION

Antitrust policy is at an ideological crossroads. The debate today is not between irrational proponents of the atomization of the American economy (usually mislabeled "populists") and the proponents of reason and the public good (usually self-described as the "economists"). Rather, the debate is whether one brand among the many and conflicting schools of economic thought should be the sole guide of antitrust policy or whether antitrust policy should foster a multiplicity of goals aimed at controlling private power in the economy so long as identifiable long-run economies of scale are not lost. The proponents of an exclusively "economic" approach, and that the approach chosen can only be the artificial, mechanistic, and deterministic school of economic theorizing commonly labeled the "Chicago school" have had three advantages in the debate. One is the underlying appeal to individual freedom wrapped up in the model. The fact that it is unthinkingly applied to giant institutions like the Exxons of this world and that it falls to pieces when applied to the real affairs of a complex and highly interrelated society where one person's freedom is often another's deprivation, seems not to concern proponents of the model. It does however, press an important value of individual freedom which should not be ignored. It's second advantage is that it appears to produce certainty—square rules to decide every question—even though the certainty provided is a false certainty and the rules it generates exclude consideration of facts and values relevant to the problems antitrust must address. Political economy confronts the complexities of the real world which refuse to conform to the predictions of artificial rules, and the use of a mechanical analytical system in law short circuits the law's function of promoting commonly-held moral beliefs and a sense of justice in the peaceful resolution of disputes. Its third advantage is that it has captured the thinking and imagination of brilliant and persuasive advocates: The Baxters, Borks, and Posners of this world. They are honest, brilliant, and persuasive in their advocacy. They enjoy widespread admiration and respect in the academic community, an admiration and respect I share. Some of my best friends are believers; but nevertheless the theology is wrong, it is impracticable, and it is a disaster when applied to the affairs of the real world and the problems individuals must confront each day. The certainty with which the beliefs are held—honestly held—are also the source of a dangerous arrogance. It is an arrogance which justifies summary dismissal of competing viewpoints, a refusal to consider countervailing viewpoints and the assumption of powers our political process has committed elsewhere. Lastly, its simplistic methodology undermines the complex analytical process the law must use, if the law is to cope constructively with resolving specific disputes in accord with the long-term values Congress has mandated be implemented by antitrust policy.

The philosophy and reforms I propose do not reject a role for economic analysis, I hope a more empirical, realistic and catholic form of it, in the development of antitrust policy and its application to specific cases. That role however, is a subservient one—not a role of displacing the process. Nor do the reforms I propose necessarily breed an ambiguity and uncertainty in the standards which would be developed. Instead, they would create a deeper understanding of the principles and values upon which antitrust policy rests; provide a practical means by which those basic policies may be linked to the litigation of specific disputes; make possible the constructive use of new insights from economics and other—but too often ignored—disciplines which have something to contribute to the understanding of the evolution of our society; and fulfill the functions of the legal process which have been too often subverted by a simplistic and mechanical reliance upon the arcane.

The current status of antitrust enforcement is not a happy one. It has always been vulnerable to ideological shifts and changes, as well as undue political influence. Mr. Baxter's intention to intervene in private suits, even though there is no statutory authority for doing so, a certain arrogance in assuming the power to do so, and an unhappy tradition of undue influence and unwise discretion in the Division's own enforcement effort, only makes the entire system more vulnerable to undue swings in its ideological emphasis and political influence in this era of PAC's. Today, we are witnessing the added undue influence of antitrust doctrine being distorted to serve the narrow ends of, I believe, a political ideology inconsistent with the purposes Congress has mandated. If that choice is to be made, our constitutional and political systems vest the authority to do so in the hands of Congress and not the transitory and unaccountable hands of political appointees of the Executive Branch. It is time for Congress to insist its prerogative be followed, not only for the benefit of the constituencies of this Committee, but for the benefit of us all.

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THE FEDERAL TRADE COMMISSION AND CONGRESSIONAL OVERSIGHT OF ANTITRUST ENFORCEMENT*

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> The FTC is a "passel of ideologues who are hostile to the business system, to the free enterprise system, and who sit down there and invent theories that justify more meddling and interference in the economy."[1]
>
> —David Stockman, Director,
> Office of Management and
> Budget

I. INTRODUCTION

For the second time in three years, Congress is contemplating serious changes in the law enforcement role of the Federal Trade Commission (FTC). Following months of intense, widely-publicized debate, Congress in 1980 curtailed the agency's statutory authority, restricted several ongoing programs, and authorized the agency's operations through September 30, 1982, with promises of unrelenting scrutiny.[2] Within the past year, several members of Congress have introduced bills to limit further the Commission's powers.[3] As the agency's appropriations and authorization measures come before the Congress, these proposals are likely to receive serious attention.[4]

An important articulated basis for the 1980 legislation and current limiting measures is the congressional perception that the Commission has contradicted the legislature's policy preferences in selecting its law enforcement programs. Congressman William Frenzel pungently captured this view in 1979 as Congress debated bills to restrict the agency's activities:

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[1] Chicago Tribune, Feb. 23, 1981, at A-1, col. 2-3. Budget Director Stockman's remark came soon after the Office of Management and Budget (OMB) had recommended budget reductions that would eliminate the FTC's Bureau of Competition, the agency's antitrust enforcement division. *See FTC Commissioners Foresee Budget Cuts As Instant Doom for Competition Programs*, [Jan.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 1002, at A-1 (Feb. 19, 1981). The OMB withdrew this proposal in the following month. *See Budget Cuts Won't Scrap FTC's Competition Mission*, [Jan.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 1004, at A-4 (Mar. 5, 1981). *See generally Impact of OMB-Proposed Budget Cuts For the Federal Trade Commission: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 97th Cong., 1st Sess. (1981) [hereinafter cited as *House 1981 Government Operations Hearings*].

[2] Federal Trade Comm'n Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (codified as amended in scattered sections of 15 U.S.C.). For a discussion of the origins and content of the 1980 statute, see *infra* text accompanying notes 429-43.

[3] *See, e.g.,* S. 1984, 97th Cong., 1st Sess., 127 CONG. REC. S15,685 (daily ed. Dec. 16, 1981). Senators McClure and Melcher introduced S. 1984 which would (1) bar the FTC from intervening in the affairs of any state-regulated profession; (2) require the FTC to bring all of its cases in federal district court; (3) direct the Commission to reimburse private parties for the cost of responding to its subpoenas and other information requests; and (4) limit substantially the scope of the agency's mandate to address "unfair methods of competition" and "unfair or deceptive acts or practices" under § 5 of the Federal Trade Commission Act. *Id.*; *see also* H.R. 3722, 97th Cong., 1st Sess., 127 CONG. REC. H2489 (daily ed. May 28, 1981) (bill with over 130 co-sponsors placing moratorium on FTC actions affecting the professions).

[4] *See Senate Unit Votes Strict FTC Curbs,* Wash. Post, May 12, 1982, at A1, col. 1; *Congress threatens to extract some of the FTC's sharpest fangs,* 14 NAT'L J. 535 (1982).

> [T]he FTC is . . . a king-sized cancer on our economy. It has undoubtably added more unnecessary costs on American consumers who it is charged with protecting, than any other half dozen agencies combined.
>
> It is bad enough to be counterproductive and therefore highly inflationary, but the FTC compounds its sins by generally ignoring the intent of the laws, and writing its own laws whenever the whimsey strikes it.
>
> . . . .
>
> Ignoring Congress can be a virtue, but the FTC's excessive nose-thumbing at the legislative branch has become legend. In short, the FTC has made itself into virulent political and economic pestilence, insulated from the people and their representatives, and accountable to no influence except its own caprice.
>
> . . . .
>
> On my most charitable days, I think repealing the FTC would be a good idea. Whenever I pick up the paper and read of another atrocity wrought by it, I think more hideous thoughts about making the punishment fit the crime. For instance, every staff member and every Commission member should spend 20 years at hard labor filling in their own asinine forms. And then they should spend the rest of their lives resubmitting the same material upside down and backward.[5]

The Commission, Representative Frenzel concluded, was "a rogue agency gone insane."[6]

Congress' acute interest in the FTC's policies comes roughly a decade after the last comparable congressional assessment of the FTC's performance. In the late 1960's and early 1970's several committees with appropriations or oversight responsibilities extensively analyzed the Commission's work and recommended a fundamental reorientation of its efforts.[7] The committees concluded that the FTC, in its first half-century, had spent its resources on largely insignificant matters and had fallen unacceptably short of the goals set for it by Congress in 1914. They generally prescribed a shift toward more innovative, aggressive enforcement strategies and singled out a number of problems to which the agency should give careful attention. On some occasions, the committees cautioned that failure to carry out these reforms would warrant the Commission's abolition.[8]

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[5] 125 CONG. REC. H10,757-58 (daily ed. Nov. 14, 1979) (statement of Rep. Frenzel). During debate over the 1980 Improvements Act, *supra* note 2, the principal Senate sponsors of the Act also expressed the view that the FTC had neglected to heed congressional policy guidance. *See* 126 CONG. REC. S5676 (daily ed. May 21, 1980) (remarks of Sen. Ford); *id.* at S5681 (remarks of Sen. Cannon).

[6] *Id.* at H10,758. *See also, e.g.*, 121 CONG. REC. S15,687 (daily ed. Dec. 16, 1981) (Sen. McClure: "In recent years, we have seen unprecedented efforts by the Commission to expand its activities into areas well beyond those charted by Congress. It is time for Congress to curb these actions."); *House 1981 Government Operations Hearings*, *supra* note 1, at 168 (OMB Director Stockman: "[I]n recent years the FTC has served the public interest very poorly, in major part because it has sought to expand its power and influence beyond that envisioned by Congress.")

This Article discusses the FTC's response to congressional oversight of its antitrust activities since 1969.[9] It begins by reviewing the 1969 *Report of the American Bar Association Commission to Study the Federal Trade Commission*.[10] This document focused congressional attention upon the FTC's antitrust role and deeply influenced the legislature's thinking in the early 1970's about the appropriate course of the agency's competition work. The *ABA Report* proposed that the Commission devote its antitrust resources to economically significant problems in complex, unsettled areas of law and economics, stressing that the agency's ability to perform this role depended heavily on the actions of institutions outside the agency—principally the Congress and the President. This Article analyzes the ABA's findings and, from a historical perspective, examines the significance of external forces on the Commission's ability to pursue the bar committee's competition proposals. The historical review helps to explain the course of the

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[7] *See infra* text accompanying notes 216-25.

[8] *Id.*

[9] This Article does not discuss congressional oversight of the Commission's consumer protection programs. For two recent studies that treat the relation of the Commission's consumer protection programs to congressional guidance in this period, see M. Pertschuk, The Rise and Pause of the Consumer Movement: Political Strategies of Regulation and Deregulation (lectures presented at the School of Business Administration, University of California, Berkeley, 1981) (forthcoming as Revolt Against Regulation: The Rise and Pause of the Consumer Movement) (hereinafter cited as Pertschuk); B. Weingast & M. Moran, Bureaucratic Discretion or Congressional Control: Regulatory Policymaking by the Federal Trade Commission, Working Paper No. 72 (Jan. 1982) (available through the Center for the Study of American Business at Washington University, St. Louis, Mo.) (hereinafter cited as Weingast & Moran) The Article also does not attempt to evaluate the legal or economic merits of the agency's antitrust activities. For recent, largely critical reviews of the substance of the FTC's antitrust programs since 1970, see THE FEDERAL TRADE COMMISSION SINCE 1970, 307-315 (K. Clarkson & T. Muris eds. 1981); Gelhorn, *Two's A Crowd, The FTC's Redundant Antitrust Powers*, AEI J. GOV'T & SOC'Y, Nov./Dec. 1981, at 32. For a more positive assessment, see Fox, *FTC: Sound, Coherent Approach to Monopoly Issues*, Legal Times of Wash., June 23, 1980, at 22, col. 1; *House 1981 Government Operations Hearings*, *supra* note 1, at 237-68 (remarks of H. Goldschmid, C. Havighurst, and J. Shenefield)..

[10] COMMISSION TO STUDY THE FTC, AMERICAN BAR ASSOCIATION, REPORT OF THE COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION, (Sept. 15, 1969) [hereinafter cited as ABA REPORT]. This Article will refer to the ABA Commission as the ABA Committee to avoid confusion with the Federal Trade Commission.

FTC's antitrust work in the 1970's and, most important, its dependency on congressional support.

The second half of the Article describes how Congress endorsed the ABA's recommendations, directing the FTC toward more ambitious antitrust initiatives. It will be shown, however, that the initially strong congressional support for expansive, innovative enforcement endeavors peaked in 1976, after which congressional enthusiasm for some programs declined. To illustrate this decline, this Article discusses some of the measures by which the 96th Congress proposed to limit the FTC's antitrust authority.[11] Through its analysis of the *ABA Report*, the historical influence of external institutions upon FTC competition activities, and the substance of legislative oversight since 1969, the Article demonstrates that the Commission's antitrust programs of the 1970's were consistent with, and responsive to, congressional policy preferences.

II. THE 1969 REPORT OF THE AMERICAN BAR ASSOCIATION COMMITTEE TO STUDY THE FEDERAL TRADE COMMISSION

On September 26, 1914, Woodrow Wilson concluded the chief antitrust legislative initiative of his presidency by signing into law the Federal Trade Commission Act.[12] With its elastic substantive mandate and broad grant of investigatory powers, the statute embodied the high expectations of Congress that the new commission would be a singularly effective tool for maintaining competition. Three weeks before the bill's enactment, Senator Albert Cummins addressed the Senate in words that expressed the hopes of many of the legislation's supporters:

> I predict that in the days to come the Federal [T]rade [C]ommission and its enforcement of the section with regard to unfair competition . . . will be found to be the most efficient protection to the people of the United States that Congress has ever given the people by way of a regulation of commerce . . . . I look forward to its enforcement with a high degree of confidence.[13]

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[11] *See supra* note 2 and accompanying text.

[12] Ch. 311, 38 Stat. 717, 15 U.S.C. §§ 41-58 (1976) [hereinafter referred to as FTC Act]. At the time of its enactment, Wilson regarded the Trade Commission Act as the centerpiece of his antitrust program. For discussions of the evolution of Wilson's antitrust thinking as it affected the formation of the FTC, see *infra* text accompanying notes 70-81; J. BLUM, WOODROW WILSON AND THE POLITICS OF MORALITY 75-79 (1956); A. LINK, WILSON: THE NEW FREEDOM 417-44 [hereinafter cited as A. LINK, FREEDOM] (1956); A. LINK, WOODROW WILSON AND THE PROGRESSIVE ERA 1910-1917, at 66-74 (1954) [hereinafter cited as A. LINK, 1910-1917].

[13] 51 CONG. REC. 14,770 (1914). On Cummins' central role in the passage of the FTC Act,

In the Commission's first half-century, a host of commentators and special committees appraised the agency's effectiveness as an antitrust enforcement body.[14] Their collective view was that the FTC had accomplished little of what the 63d Congress envisioned. Virtually every study stimulated attempts at reform. Few, however, were so influential—and none as significant in its effects upon modern Commission activities—as the *ABA Report*.

The American Bar Association (ABA) began its study in 1969, at President Richard Nixon's request,[15] several months after a Ralph Nader-sponsored critique of the Commission drew widespread attention to the agency.[16] To conduct the inquiry, ABA President William Gossett selected a committee of sixteen individuals with differing viewpoints and broad familiarity with the FTC.[17] Although severely critical of the agency's antitrust achievements, the Committee still perceived a uniquely useful antitrust role for the FTC.[18] Anchoring this view was the belief that the Commission possessed a special capacity for resolving economically complex and unsettled competition policy issues.

A. *Findings and Recommendations*

The *ABA Report* analyzed the agency as a whole and examined each operating bureau. This section reviews criticism relevant to antitrust enforcement, beginning with agency-wide functions that significantly affected the FTC's competition work.

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see Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C.L. REV. 227, 231-38 (1980).

[14] *See infra* notes 59, 61, 69, 113, 127 & 136.

[15] ABA REPORT, *supra* note 10, at 86.

[16] *See The Consumer and the Federal Trade Commission—A Critique of the Consumer Protection Record of the FTC*, 115 CONG. REC. 1539 (1969) (remarks of Sen. Nelson). The Nader Report was later expanded and published in E. COX, R. FELLMETH, & J. SCHULZ, "THE NADER REPORT" ON THE FEDERAL TRADE COMMISSION (1969) [hereinafter cited as NADER REPORT]. *See* ABA REPORT, *supra* note 10, at 88.

[17] ABA REPORT, *supra* note 10, at 88 (press release of William Gossett). The committee consisted of five law professors, two economists, seven attorneys in private practice, a counsel to a major labor union, and a counsel to a major civil rights organization. The Committee's Chairman, Miles Kirkpatrick, later chaired the FTC from 1970-1973. Robert Pitofsky, the Committee's counsel and principal author of the Committee's Report, headed the agency's Bureau of Consumer Protection in the early 1970's and served as a commissioner from 1978-1981.

[18] Of all the committee members, only Richard Posner opposed the Report's recommendations. ABA REPORT, *supra* note 10, at 92-119. Posner believed the underlying premises upon which Congress founded the agency—the ability to address anticompetitive practices beyond the reach of prevailing interpretations of the Sherman Act; and the desirability of developing antitrust policy through a specialized body with flexible substantive authority and political independence—were no longer valid. *Id.* at 115. For an elaboration of these views, see Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47 (1969).

1. General Criticism

The Committee's overall evaluation of the agency was unfavorable. By any of several tests, the *Report* found the FTC wanting: "[The Commission's] performance when measured against a reasonable standard of acceptable government operation has been disappointing. When actual performance is measured against the potential which the FTC continues to possess, the agency's performance must be regarded as a failure on many counts."[19]

The agency's poor performance, the Committee concluded, was due mainly to its failure to establish goals and priorities.[20] The FTC's review of its goals and priorities took place on an ad hoc basis only,[21] and reliance upon passive case selection tools such as the "mailbag" channel led FTC resources toward economically insignificant pursuits.[22] Even where the FTC had systematically established priorities, it rarely translated these objectives into guidelines for its staff.[23]

To cure these flaws, the *ABA Report* recommended that the FTC promptly "embark on a program to establish goals, priorities, and effective planning controls."[24] An attractive approach, the Report concluded, would be an "immediate expansion and reinvigoration of the Office of Program Review," the FTC's existing planning apparatus.[25]

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[19] ABA REPORT, *supra* note 10, at 35.

[20] The Committee observed:

> Many of the present problems of the FTC—including allocation of resources, commitment of time and effort to relatively trivial matters, and extensive delay in the investigational stage of agency action—are traceable to a considerable extent to the fundamental failure to establish goals and priorities and to implement effective planning controls consistent with those goals and priorities.

Id. at 77.

[21] *Id.* at 12. This criticism did not apply to the FTC's merger program, whose management and operation the ABA praised. *Id.* at 13 n.33.

[22] Faulty planning, the Committee stressed, "has caused a misallocation of funds and personnel to trivial matters rather than to matters of pressing public concern." *Id.* at 1. To the Committee, the preoccupation with trivia manifested itself in excessive fur and textile statute enforcement and inadequate spending on the merger program. *Id.* at 45, 69.

[23] In the Committee's view, the typical FTC staff member had "no institutional devices or agency-wide standards . . . for comparing the relative merits of allocating FTC resources to proceedings against possible violations of law. . . ." *Id.* at 13. This weakness frustrated the implementation of coherent policies for opening and closing investigations, selecting remedies, and filing complaints.

[24] *Id.* at 3. The *ABA Report* considered this to be the agency's top reform priority: "The first and most pressing order of business in revitalizing the FTC must be to replace present case-by-case techniques for opening and closing investigations, filing complaints, and settling cases with comprehensive planning controls." *Id.* at 77.

[25] *Id.* at 78. Established in the early 1960's, the Program Review Office had consisted of one attorney, one economist, and a secretary. The position of Program Review Officer had been vacant for over a year when the ABA did its study. *Id.* at 12-13.

This office would review long-range goals,[26] measure anticipated returns from enforcement initiatives against their cost,[27] and prepare "an agenda of projects that ought to be undertaken by each bureau and division . . . and indicate priorities with respect to each."[28] By curtailing the use of "passive" case selection devices,[29] the project agenda would help correct the agency's "unfortunate tendency to involve itself in investigations and projects of marginal importance."[30] To give practical effect to this process, the planning office would devise enforcement guidelines for the FTC's staff.[31]

A second basic cause of the Commission's poor performance was its inability "to manage the flow of its work in an efficient and expeditious manner."[32] The FTC's worse management shortcoming was its haphazard system for monitoring the progress of cases and investigations.[33] This weakness severely hampered attempts to bring enforcement efforts to a timely conclusion.[34] Moreover, the agency's procedures were afflicted by a "crippling delay" which the ABA Committee found to be "about as serious . . . as at any time in the agency's history."[35]

The *ABA Report* proposed several management reforms to reduce delay. A vital first step was to establish a system for supervising the progress of cases and investigations,[36] a second was to review the Commission's Rules of Practice and Procedure "to modernize and maximize the efficiency of the Commission's operations,"[37] and a third was to delegate more authority to the agency's staff.[38] Beyond reducing delay, delegation would diminish the potential conflict that the ABA perceived to exist when commissioners sat as judges in matters that required their approval for commencement.[39]

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[26] *Id.* at 78.

[27] *Id.*

[28] *Id.* at 80.

[29] *Id.*

[30] *Id.* The Committee said the "failure of the FTC to initiate projects relevant to pressing contemporary needs" had resulted "[i]n important part . . . from the agency's traditional reliance on the mailbag to generate most investigations and projects in the absence of comprehensive planning and priorities." *Id.*

[31] The guidelines would explain the Commission's priorities, delineate its powers to address them, and supply criteria for opening and closing investigations and cases. *Id.* at 79.

[32] *Id.* at 1.

[33] The *ABA Report* observed: "It . . . appears that there is no effective procedure within the FTC to keep track of progress on matters formally initiated, to establish realistic deadlines, or to terminate investigations once it becomes apparent that anticipated returns do not justify continued investment of time and effort." *Id.* at 15.

[34] Because the FTC lacked an effective tracking system, the *ABA Report* stated, "projects of various kinds often disappear into the lower reaches of the agency and then resurface after many years." *Id.* at 81.

[35] *Id.* at 34.

[36] *Id.* at 81.

[37] *Id.* at 84.

A third important source of the Commission's ineffectiveness lay in its choice of enforcement tactics. From recent enforcement statistics, the ABA Committee discerned that "the FTC has resorted less frequently to formal proceedings, and has increased its reliance upon an 'informal' or 'voluntary compliance' approach to bring about industry-wide compliance."[40] The Committee said the de-emphasis of formal enforcement had "gone too far," damaging the agency's enforcement credibility.[41] The Committee added that "[v]oluntary compliance" was especially suspect without an effective program to ensure compliance.[42] Accordingly, the Committee recommended that the FTC resort more to compulsory enforcement proceedings and expand its efforts to check compliance with its outstanding orders.[43]

2. Antitrust

In general, the ABA Committee considered the FTC's antitrust performance "less than satisfactory."[44] The agency's disappointing record resulted largely from its failure "to take advantage of the unique strengths conferred upon it by Congress . . . in 1914."[45] With its investigatory powers, institutional expertise, jurisdictional flexibility, and equitable remedies, the FTC appeared ideally suited to address the mixed economic and legal issues that dominate antitrust.[46]

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[38] *Id.* at 3, 81-83. The ABA recommended that bureau directors be authorized, among other things, to issue complaints and close investigations.

[39] *Id.* at 82-83. The ABA Committee predicated its delegation recommendations on the completion of its suggested planning reforms.

[40] *Id.* at 8. The informal devices included industry guides, advisory opinions, trade regulation rules, and assurances of voluntary compliance and informal corrective actions. *Id.* at 8-9.

[41] *Id.* at 25. The panel observed: "With such an obvious disinclination by the FTC to proceed formally, we fear that the business community may cease to take seriously the guides, rules, and other administrative pronouncements by the FTC, and also may cease to take seriously the statutes the FTC is empowered to enforce." *Id.* at 26.

[42] The ABA stated:

> [W]e question the operation of a voluntary compliance program for which no effective compliance checks have been devised. Many companies that voluntarily agree to change their business practices undoubtedly will do so, but others will not. Absent a program of careful compliance surveillance, coupled with strong sanctions when necessary, the voluntary compliance program cannot be regarded as effective law enforcement.

Id. at 26.

[43] *Id.* at 79.

[44] *Id.* at 64.

[45] *Id.* The *Report* identified the "unique strengths" as (1) broad investigatory powers; (2) the centralization in one agency of Commissioners, administrative law judges, attorneys, and economists who could develop special competence in the antitrust field; (3) the ability to decide questions without necessarily relying on case-by-case precedent; and (4) the power to issue studies to the President, Congress, and the public on antitrust issues. *Id.* at 64-65.

Since 1914, however, this potential seldom had transcended the level of mere possibility. Merger enforcement aside, the Committee could find few FTC accomplishments on the frontiers of antitrust law:

> If the measure of the quality of FTC performance in the antitrust area is whether the agency has broken new ground and made new law by resort to its unique administrative resources, it seems clear that the record is largely one of missed opportunity. However, the FTC did lead the way in implementation and interpretation of Section 7 of the Clayton Act. Moreover, that program has been carried out not simply by the institution of formal proceedings, but by the publication of economic reports and the promulgation of guides, *i.e.*, by use of the full panoply of administrative resources available to the FTC.[47]

Although seemingly speaking hypothetically, the Committee's next remark revealed that it believed "ground breaking" to be an appropriate performance standard: "In the expectation that these kinds of successes can be repeated and extended by the revitalized FTC we envisage, we decline to propose the elimination of antitrust enforcement authority in the FTC."[48] Thus, in weighing the desirability of antitrust enforcement by administrative means, the Committee recommended that the FTC retain its antitrust authority: "However well the federal judiciary may now be thought to be functioning in this area, there is an important role for the administrative process in solving difficult and complex antitrust questions."[49]

Because it expected the FTC to apply the "full panoply" of its resources to break new ground and make new law in the many "difficult and complex" areas of antitrust policy, the Committee endorsed continued antitrust responsibility for the agency.[50] The significance of this view is evident in the ABA's recommendations about the future division of labor between the Antitrust Division of the Department of Justice (DOJ) and the FTC:

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[46] *Id.*

[47] *Id.* at 65. Shortly before discussing the Commission's limited accomplishments as an antitrust pathfinder, the Committee noted, without comment, that "[u]nder the Lanham Trademark Act, 15 U.S.C. § 1064 (1964), the FTC has power (never used) to cancel trademarks where used for anticompetitive purposes." *Id.* at 64 n.98.

[48] ABA REPORT, *supra* note 10, at 65.

[49] *Id.* at 64. Earlier, the *Report* had concluded that the FTC could "perform valuable service in bringing the administrative process to bear on difficult and complex problems." *Id.* at 2.

[50] *Id.* at 2, 65. If well-established, per se violations were antitrust policy's exclusive concern, one presumes the ABA might have suggested a different course.

> We recommend that the FTC concentrate on antitrust enforcement that would make best use of the unique advantages of its administrative process. This would mean, for example, that the FTC should take no action in situations in which the conduct at issue, if challenged by the Department of Justice, would be likely to be challenged in a criminal proceeding. Cases of *per se* illegality, such as price-fixing, market allocation, and boycotts designed to enforce price-fixing cartels should thus be left to the Department of Justice. For the trial of these cases which usually involve nothing more than controversies over whether alleged conduct in fact occurred, the criminal sanctions, where appropriate, and litigation procedures of the district courts are better suited than the FTC's administrative approach.
>
> On the other hand, where issues of anticompetitive effects turn essentially on complicated economic analysis, and where decided cases have not yet succeeded in fashioning a clear line marking the boundary between legal and illegal conduct, such matters should generally be assigned to the FTC.[51]

The ABA proceeded to suggest three specific changes in the FTC's antitrust programs. First, it singled out vertical restraints as one "complicated and economically significant" area in which the FTC had "foregone opportunities to participate in the constructive development of law that might contribute to the attainment of antitrust objectives."[52] Second, the Committee proposed that the FTC expand its merger enforcement efforts.[53] Finally, the ABA recommended that the agency "initiate a study and appraisal of the compatibility of the Robinson-Patman Act and its current interpretations to the attainment of antitrust objectives,"[54] and during this appraisal, limit its enforcement of the Act to "instances in which injury to competition is clear."[55]

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[51] *Id.* at 66.

[52] *Id.* at 68. In another passage, the ABA stated that the FTC had "virtually abandoned" efforts to address vertical distribution problems. *Id.* The Committee identified several problems—dual distribution, territorial confinement and other limitations on franchises, and price squeezes—for which "the expertise of the FTC could be employed to enlighten the business community and the courts." *Id.*

[53] The ABA generally praised the FTC's merger work. *Id.* at 69. "In this area . . . the FTC has contributed to the adoption of original and important theories of antitrust enforcement." *Id.* (footnote omitted). The Committee added that the agency had not "committed enough of its resources to the divisions charged with responsibilities in the merger area." *Id.*

[54] *Id.* at 67; 15 U.S.C. §§ 13-13b, 21a (1976).

[55] *Id.* at 68.

3. Conclusion

The success of the ABA's recommended program depended upon the quality of the FTC's leadership and staff, both of which the ABA found deficient.[56] The Committee acknowledged, however, that whether and how far the FTC would press its renewal were questions that only Congress and the President could answer. The Report stated:

> If the proposals in this report are ever to be implemented, and if the FTC is to fulfill the role we believe it can play, it must have the continuous vigorous support of the President and Congress. The first important manifestation of that support should be the appointment of a Commission Chairman with executive ability, knowledge of the tasks Congress has entrusted to the agency, and sufficient strength and independence to resist pressures from Congress, the Executive Branch, or the business community that tend to cripple effective performance by the FTC.[57]

If Congress, the President, and the agency's own leaders did not pursue a comprehensive reform program, the Committee flatly favored the FTC's abolition:

> In conclusion, this Commission believes it should be the last of the long series of committees and groups which have earnestly insisted that drastic changes were essential to recreate the FTC in its intended image. The case for change is plain. What is required is that the changes now be made, and in depth. Further temporizing is indefensible. Notwithstanding the great potential of the FTC in the field of antitrust and consumer protection, if change does not occur, there will be no substantial purpose to be served by its continued existence; the essential work to be done must then be carried on by other governmental institutions.[58]

As its dramatic insistence upon immediate reform shows, the ABA was impressed by how similar its findings were to earlier evaluations of the FTC's antitrust performance.[59] The Committee's review of previous critiques suggested steadfast resistance by the FTC to needed changes:

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[56] The Committee concluded that there were "too many instances of incompetence in the agency, particularly in senior staff positions." *Id.* at 34. The panel believed that the uneven quality of staff, like other FTC shortcomings, reflected badly on the Commission's leadership. *See id.* "The primary responsibility for these failures must rest with the leadership of the Commission. In recent years, bitter public displays of dissension among Commissioners have confused and demoralized the FTC staff, and the failure to provide leadership has left enforcement activity largely aimless." *Id.* at 1.

[57] *Id.* at 35.

[58] *Id.* at 3. The *Report* did not specify which "other governmental institutions" would carry on the agency's work, though presumably the Justice Department would assume the FTC's antitrust duties.

> Since its establishment in 1914, a succession of independent scholars and groups have sounded much the same themes in their criticisms of the FTC, including the absence of effective planning and failure to establish workable priorities, the consequent tendency to become involved in too many trivial cases, the delay and unnecessary secrecy in FTC operations, and the uneven quality of staff. It is worthy of note that each successive study made it clear that the older criticism was still applicable and that previously proposed solutions generally had been ignored.[60]

At first glance, experience with the critical historical commentary suggested the futility of still another report that recited the same basic flaws and, yet, like most of its predecessors, said the FTC should retain its antitrust authority. The crucial question was why the FTC had not heeded previous reform proposals. To be convincing, the ABA had to show why its recommendations might take hold where other critiques apparently had failed.[61]

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[59] The *ABA Report* cites eight previous studies of the FTC: Bureau of the Budget, Federal Trade Commission Study (1960); Committee on Independent Regulatory Commissions, Task Force Report on Regulatory Commissions (Jan. 1949) (submitted separately by The Hoover Commission as Appendix N to Commission on Org. of the Executive Branch of the Gov't, The Independent Regulatory Commissions (Mar. 1949)) [hereinafter cited as Hoover Comm'n Task Force Report]; T. Blaisdell, The Federal Trade Commission (1932); G. Henderson, The Federal Trade Commission: A Study in Administrative Law and Procedure (1924); L. Kohlmeier, The Regulators (1969); C. Auerbach, Report on the Internal Organization and Procedure of the Federal Trade Commission (Dec. 1962), *reprinted in* 48 Minn. L. Rev. 393 (1964); J. Landis, Report on Regulatory Agencies To The President-Elect (Dec. 1960); Nader Report, *supra*, note 16 at 5 n.3, 10 nn.22-23, 11 n.29.

[60] ABA Report, *supra* note 10, at 9. One should be wary of the notion advanced in this passage that the earlier commentary was so completely homogenous as the ABA suggests. These critiques make many of the same points but they contain important differences as well. Significant points of disagreement or variations in emphasis emerge in discussions of the nature and causes of the agency's weaknesses, the appropriate standards for measuring performance, and the correct path for reform. To say that earlier critics shared common assumptions and spoke with one voice in evaluating the FTC's performance imparts a misleading simplicity to the problems and policy choices facing the Commission throughout its history. For an insightful review of the literature assessing the work of the FTC and other regulatory agencies, see McCraw, *Regulation in America: A Review Article*, 49 Bus. Hist. Rev. 159 (1975).

[61] Most earlier evaluations of the FTC and antitrust enforcement had recommended that the agency continue to exercise antitrust authority. Some studies explicitly endorsed dual antitrust enforcement. G. Henderson, *supra* note 59, at 327; Hoover Comm'n Task Force Report, *supra* note 59, at 120, 125; Attorney General's Nat'l Comm. to Study the Antitrust Laws: Report of the National Committee to Study the Antitrust Laws 375-77 (1955). Several other major critiques did not address the issue directly but made proposals that assumed the retention of concurrent jurisdiction. *See* Budget 1960 Study, *supra* note 59; C. Auerbach, *supra* note 59; White House Task Force on Antitrust Policy (Neal Report) (presented to

The ABA Committee suggested two reasons for the minimal effect of earlier commentaries. The first was the tepid quality of previous FTC reform efforts. While noting exceptions, the Committee perceived a near contentment by the FTC with unobtrusive law enforcement, interrupted only by infrequent attempts to test the full potential inherent in its charter.[62] The Committee recognized that some often-mentioned reform goals, such as effective planning, were intrinsically elusive, and in discussing the Commission's enforcement attitudes, the ABA did not claim to have exhausted all possible organizational or institutional explanations, short of outright neglect, for the agency's seeming disinclination to pursue significant antitrust matters.[63] Nevertheless, the Committee concluded that the FTC, to an inexcusable degree, had merely shrugged off previous reform proposals. To prevent the agency from ignoring its recommendations, the ABA warned that the appropriate alternative to serious reform was the Commission's abolition.

Although it questioned the Commission's fortitude, the ABA was not satisfied that frail institutional will was the only, or even dispositive, reason for the scant discernable impact of earlier studies. In one salient passage, the Committee intimated that forces outside the agency had deadened the FTC's reform impulses. "If the proposals in this report are ever to be implemented, and if the FTC is to fulfill the role we believe it can play, it must have the continuous vigorous support of

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President Johnson on July 5, 1968 and released on May 21, 1969), *reprinted in Economic Concentration: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. Pt. 8, at 5054-82 (1970) [hereinafter cited as *Economic Concentration Hearings: Pt. 8*]. On the other hand, James Landis' 1960 commentary proposed that the FTC's antitrust authority be transferred to the Justice Department. Landis, *supra* note 59, at 29-30, 51-52; *see also* President's Task Force Report on Productivity and Competition (*Stigler Report*) (released June 16, 1969), *reprinted in Economic Concentration Hearings: Pt. 8*, at 5034-52. The *Stigler Report* stated that "substantial retrenchment by the Commission in the antitrust fields is highly desirable," but stopped short of recommending the total elimination of the agency's antitrust powers. *Id.* at 5039.

[62] The *ABA Report* referred to the following passage from the Hoover Commission Task Force Report:

> As the years have progressed, the Commission has become immersed in a multitude of petty problems; it has not probed into new areas of anticompetitive practices; it has become increasingly bogged down with cumbersome procedures and inordinate delays in disposition of cases. Its economic work—instead of being the backbone of its activities—has been allowed to dwindle almost to none. The Commission has largely become a passive judicial agency, waiting for cases to come up on the docket, under routinized procedures, without active responsibility for achieving the statutory objectives.

ABA Report, *supra* note 10, at 10 (quoting Hoover Comm'n Task Force, *supra* note 59, at 125).

[63] *See* ABA Report, *supra* note 10, at 15; *see also* R. Katzmann, Regulatory Bureaucracy: The Federal Trade Commission and Antitrust Policy 76-85, 180-89 (1980) (observing that the opening of some small, easily prosecuted cases may be important to recruiting and retaining a capable litigation staff).

the President and Congress."[64] The Report called for the appointment of a chairman with "sufficient strength and independence to resist pressures from Congress, the Executive Branch, or the business community that tend to cripple effective performance by the FTC."[65] Surprisingly, the ABA Report contained little mention of the environment surrounding the FTC in 1969, but the ABA Committee seems to have contemplated the willingness of actors outside the agency, particularly the President and the Congress, to support the agency's rejuvenation.

B. *External Influences on FTC Antitrust Performance*

The history of the FTC's competition programs suggests that the attitudes and behavior of institutions outside the agency were indeed important to the ABA's reform proposals. The agency's historical relationships with the President, the Congress, the judiciary, and the business community all had influenced the scope and quality of the FTC's antitrust endeavors. Drawing upon major events in the agency's history, the balance of this section addresses several important events and trends that help explain the ABA's implicit view in 1969 that external circumstances favored the agency's antitrust transformation.[66]

1. Stature of Competition Policy

Since 1914, the scope and substance of FTC antitrust enforcement have depended fundamentally on how dearly the country has valued competition over rival systems for organizing the nation's economy.[67] The antitrust laws embody, among other things, a social preference for the primacy of market forces and limited government supervision of the economy.[68] These measures, however, are neither the sole nor final expressions of national policy toward economic organization. For much of this century, they have coexisted with many other statutes and policies that either stress a greater government role in guiding economic activity or exempt various industries from the competition rules applying to business generally. As political scientist Pendleton Herring observed in 1936, the country's refusal to give competition policy a more certain endorsement hindered the FTC's antitrust work: "An agreed-upon policy concerning government regulation of industry has not yet been developed with the clarity or objectivity essential in establishing a basis for the free exercise of discretion by an independent commission. Vacillations as to fundamental policy have disrupted the career of the Federal Trade Commission."[69]

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[64] *Id.* at 35.

[65] *Id.*

[66] This review focuses mainly on the actions of governmental bodies toward the FTC. It therefore treats the influence of businessmen and the public on FTC activities indirectly as it emerges through the actions of the President, Congress, and the judiciary.

[67] For an especially illuminating historical analysis of antitrust enforcement as a function of changing social attitudes toward competition and the market system, see R. Hofstadter, *What Happened to the Antitrust Movement?*, in The Paranoid Style in American Politics and Other Essays 188 (1965). For two important, recent contributions to the literature on the history of competition policy, regulation, and business-government cooperation, see Regulation in Perspective (T. McCraw ed. 1981); Office of Special Projects—Bureau of Competition, Federal Trade Commission, National Competition Policy: Historians' Perspectives on Antitrust and Government-Business Relationships in the United States (1981).

[68] On the public mood that precipitated congressional moves in the late 19th and early 20th centuries to redress monopoly, see generally R. Hofstadter, The Age of Reform 213-69 (1955); H. Thorelli, The Federal Antitrust Policy 54-163, 235-368 (1955); S. Hays, The

The question of what role competition should play in governing economic activity dates back to the FTC's very creation. The problem of monopoly occupied a prominent place in the presidential election campaign of 1912.[70] All three candidates—Taft, Wilson, and Theodore Roosevelt—addressed the issue, but attention focused mainly on Wilson's and Roosevelt's antitrust enforcement views.[71] Wilson proposed supplementing the Sherman Act with legislation banning the specific, illicit devices that enabled firms to achieve market power. "Our purpose is the restoration of freedom. We propose to prevent private monopoly by law, to see to it that the methods by which monopolies have been built up are legally made impossible."[72]

Roosevelt, the independent, Progressive Party candidate, took a

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RESPONSE TO INDUSTRIALISM 1885-1914, at 4-93 [illegible], R. WEIBE, THE SEARCH FOR ORDER 1877-1920, at 1-163 (1967).

[69] P. HERRING, PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST 110 (1936). Twenty years later, Marver Bernstein, another scholar in the field of public administration, appraised the agency's antitrust record in terms very similar to Herring's:

> The most critical problem of the FTC enforcement program stems from national inability to fix a course of antimonopoly action. The FTC has inherited the national ambivalence toward antimonopoly and competition. Moreover, it must operate in an environment marked by notable legislative deviations from antimonopoly objectives. . . . Its programs are complicated by the American habit of both respecting the accomplishments of bigness and fearing the political and economic consequences of increasing concentration of economic power. Its burden of enforcement is increased immeasurably by the lack of a clear commitment to antimonopoly policy throughout the government and the country generally.

M. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 222 (1955).

[70] *See* G. HENDERSON, *supra* note 59, at 16-19, 22-24; R. HOFSTADTER, *supra* note 68, at 246-50; A. LINK, 1910-1917, *supra* note 12, at 18-21.

[71] R. HOFSTADTER, *supra* note 68, at 247-49; A. LINK, 1910-1917, *supra* note 12, at 18-21.

[72] W. WILSON, THE NEW FREEDOM 222 (1913). "Everybody who has even read the newspapers knows the means by which these men built up their power and created these monopolies. Any decently equipped lawyer can suggest to you statutes by which the whole business can be stopped." *Id.* at 172. The architect of Wilson's position on antitrust during the campaign was Louis Brandeis. A. LINK, 1910-1917, *supra* note 12, at 20-21.

different tack. Viewing substantial industrial concentration as inevitable, he recommended that the federal government guide the great accumulations of private economic power toward public ends.[73] Roosevelt envisioned a federal commission with authority to regulate the issuance of securities; compel publication of company accounts; investigate any business activity; control hours, wages, and other conditions of labor; and set maximum prices for goods produced by monopolists who had attained their positions by honest means.[74]

Wilson denounced Roosevelt's industrial commission as an "avowed partnership between the government and the trusts" in which business interests would dictate national policy,[75] but his spirited objections placed him further away from Roosevelt than their views actually warranted.[76] To most observers in 1912, however, their ideas mirrored a deep ideological division among progressives over the correct approach to economic organization. Historian George Mowry defined the difference in these terms: "The one school cherished the competitive system with its individual values and feared the powerful state; the other welcomed concentrated power whether in industry or politics, looked to a paternalistic state staffed by an educated elite for leadership, and depreciated individualism."[77]

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[73] Two major works of progressive thought helped move Roosevelt to this position: H. Croly, The Promise of American Life (1909); C. Van Hise, Concentration and Control: A Solution of the Trust Problem in the United States (1912). Croly attacked the historical perception that equated a Hamiltonian policy of government intervention with aristocracy and special privilege—an attitude that inhibited the creation of national policies to achieve Jeffersonian, or democratic ends. To Croly, the country needed a "new nationalism" in which the federal government would work actively to change economic and social conditions. Van Hise saw economic concentration as predetermined by the evolution of modern business, but believed administrative control of the products of this evolutionary trend was essential. On Croly's significance to Roosevelt's thought, see E. Goldman, Rendevous With Destiny 146-65 (Vintage ed. 1955). On Van Hise's significance to Roosevelt's thoughts, see A. Schlesinger, The Crisis of the Old Order 1919-1933, at 22 (1957).

[74] Roosevelt described the main elements of his program in Roosevelt, *The Trusts, the People, and the Square Deal,* 99 Outlook 649 (November 18, 1911); *see also* J. Blum, The Republican Roosevelt 116-123 (1977).

[75] W. Wilson, *supra*, note 72, at 202. "If the government is to tell big business men how to run their business," Wilson asked, "then don't you see that big business men have to get closer to the government even than they are now? Don't you see that they must capture the government, in order not to be restrained too much by it?" *Id.* at 201-02.

[76] *See* R. Hofstadter, *supra*, note 68, at 247-48. Wilson feared size wrought by consolidation or illicit practices; he disclaimed any desire to disturb firms that achieved dominance through "fair competition" alone. Wilson appeared to assume that those who pursued monopoly profit by exclusively benign means were doomed to Sisyphean frustration. Nonetheless, he seemed willing to let such ambition have its day. *See generally*, W. Wilson, *supra* note 72, at 163-91. Wilson's implicit faith that purely innocent behavior could virtually never yield a monopoly was probably the major respect in which his views differed from Roosevelt's.

It is wrong to attribute to Roosevelt in 1912 the total contempt for the Sherman Act that possessed some progressives who scorned the statute as a foolish bar to beneficial national planning. H. Croly, *supra* note 73, at 274; W. Lippmann, Drift and Mastery 124-46 (1914). Roosevelt in 1913 saw a continuing usefulness for the Sherman Act as a means for dissolving firms that had acquired monopoly power through sharp practices. *See* T. Roosevelt, Autobiography 423-50 (1913). Nonetheless, by the end of the decade, Roosevelt did turn against the measure whose application once stamped him as a "trustbuster." Approving the suspension of antitrust enforcement during World War I, Roosevelt wrote, "If the Sherman Law hurts our production and business efficiency in war time, it hurts it also in peace time, for the problems . . . are no different . . . ." T. Roosevelt, The Foes of Our Own Household 122 (1917).

After defeating Roosevelt and Taft to gain the Presidency, Wilson, in his original antitrust package, asked Congress to augment the Sherman Act with a roster of specific illegal practices; and to create a new trade commission with advisory and investigatory powers—a concept that, at least in organizational form, resembled the Rooseveltian agency he had earlier derided.[78] Upon the advice of Louis Brandeis and George Rublee, Wilson also gradually came to support a commission with adjudicatory authority to apply a broad standard proscribing unfair competitive practices.[79]

At Wilson's urging, Congress put the expanded trade commission proposal atop its antitrust agenda. The legislators soon directly addressed the Commission's role: Should it promote competition policy or exercise public-utility regulation functions, including ratemaking?[80] Congress firmly endorsed the former in passing the FTC Act.[81] The new agency's founders believed it would remove impediments to competition, but would not plan or coordinate the affairs of business.

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[77] G. Mowry, The Era of Theodore Roosevelt 57 (1958); *see also*, J. Blum, *supra* note 12, at 59-62; A. Link, 1910-1917, *supra* note 12, at 18-21.

[78] Wilson presented his original antitrust plan in a message to Congress in January 1914. *See* H.R. Doc. No. 625, 63rd Cong., 2d Sess. (1914), *reprinted in* 51 Cong. Rec. 1962-64 (1914). Henderson in 1924 observed that "the Rooseveltian conception of an administrative agency to license and supervise the 'trusts' had been the target of some of Mr. Wilson's most effective eloquence." G. Henderson, *supra* note 59, at 24.

[79] Rublee's and Brandeis' roles in moving Wilson to support a trade commission with adjudicatory powers and a flexible mandate are discussed in A. Link, Freedom, *supra* note 12, at 436-442; *see also* A. Mason, Brandeis—A Free Man's Life 402-04 (1946); Rublee, *The Original Plan and Early History of the Federal Trade Commission*, 11 Proc. Acad. Pol. Sci. 666 (1926).

[80] The Senate Interstate Commerce Committee explicitly defined the policy choice as it reported the trade commission bill to the full Senate:

> With the development of public sentiment on the subject of a trade commission, points of view have naturally changed with respect to particular provisions, and differences have also appeared with respect to the extent of the power to be lodged with such a commission. Some would found such a commission upon the theory that monopolistic industry is the ultimate result of economic evolution and that it should be so recognized and declared to be vested with a public interest and as such regulated by a commission. This contemplates even the regulation of prices. Others hold that private monopoly is intolerable, unscientific, and abnormal, but recognize that a commission is a necessary adjunct to the preservation of competition and to the practical enforcement of the law. The functions of such commissions would be as distinct and different as the ideas upon which they are founded.

S. Rep. No. 597, 63d Cong., 2d Sess. 10 (1914); *see also* H. Seager & C. Gulick, Trust and Corporation Problems 415 (1929).

[81] S. Rep. No. 597, 63d Cong., 2d Sess., 10 (1914); *see also* Blaisdell, *supra* note 59, at 2.

To its creators, the FTC Act reaffirmed the competition goals Congress had enshrined as national policy in 1890. Nonetheless, the Commission's establishment did not entirely dismay disciples of Roosevelt who preferred pervasive business-government cooperation and central planning. Congress mainly had intended to promote more effective antitrust enforcement, but the new agency conceivably had other uses as well.[82] Since the statute did not expressly limit the agency to antitrust enforcement, the FTC, if properly directed, could supply a flexible instrument for joining government and business in a cooperative venture to direct the economy.[83]

The struggle between the competition and cooperation models most strongly affected the FTC's role from World War I through the late 1930's.[84] Central planning and cooperation made their first major inroads into American economic policy during the First World War.[85] The war mobilization virtually suspended antitrust enforcement and reoriented the FTC mainly toward information-gathering.[86] Through the War Industries Board (WIB), the federal government exercised sweeping power over the country's economic activities, controlling priorities, allocation, and pricing.[87]

The mobilization provided the country's first major experiment in comprehensive economic planning, and created a new class of leaders in government, business, and academia who felt the WIB model of government-business cooperation should be pursued in peacetime.[88] Following several unsuccessful efforts at the war's end to obtain a continuing formal relaxation of antitrust enforcement, this group of individuals focused their energies upon the development of systems for industry self-regulation and business-government cooperation.[89] The principal patron of this "associationalist" movement was Herbert Hoover, who, as Secretary of Commerce and President, encouraged the formation of trade associations and professional societies.[90] Hoover urged these groups to prepare codes of ethical business behavior, collect and disseminate data on production and inventories, and promote "product simplification" by reducing the number of sizes and types of goods.[91]

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[82] Herbert Croly raised this point several months after the FTC Act became law: "In this Trade Commission act is contained the possibility of a radical reversal of many American notions about trusts, legislative power, and legal procedure. It may amount to historic political and constitutional reform. It seems to contradict every principle of the party which enacted it." THE NEW REPUBLIC 8 (Jan. 9, 1915).

[83] *See generally* Jaenicke, *Herbert Croly, Progressive Ideology, and the FTC Act*, 93 POL. SCI. Q. 471 (1978).

[84] R. HOFSTADTER, *supra* note 67, at 193 (referred to this period as the "era of neglect" for antitrust enforcement).

[85] *See* Cuff, *"Business, the State, and World War I: The American Experience,"* in THE ORDEAL OF TWENTIETH-CENTURY AMERICA, INTERPRETATIVE READINGS 48 (J. Schwartz ed. 1974); Himmelberg, *The War Industries Board and the Antitrust Question in November 1918*, 52 J. AM. HIST. 59 (1965).

[86] *See* note 85 *supra*. During the war the Commission devoted most of its attention to investigating the cost and supply of essential raw materials. H. MILLER, WORLD WAR ACTIVITIES OF THE FEDERAL TRADE COMMISSION 1917-1918, at 2-15 (1940); FTC, ANN. REP. 10-43 (1920).

[87] W. LEUCHTENBURG, THE PERILS OF PROSPERITY 1914-32, at 40-41 (1958); A. SCHLESINGER, THE CRISIS OF THE OLD ORDER 1919-1933, at 37-38 (1957). *See generally* B. BARUCH, AMERICAN INDUSTRY IN THE WAR (1941).

[88] Leuchtenberg, *The Impact of the War on the American Political Economy*, in THE IMPACT

The FTC's activities in the 1920's strongly reflected the influence of associationalism.[92] The most important manifestation was the development of the trade practice conference.[93] The Commission initiated the conferences by inviting all firms in an industry to meet with a

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of World War I, 57, 58-63 (A. Link ed. 1969); E. Goldman, Rendezvous With Destiny 237-38 (1955); B. Baruch, *supra* note 87, at 104-07. Calling the antitrust laws "the simpler principles sufficient for the conditions of a bygone day," Baruch, who headed the War Industries Board, said the mobilization had enabled businessmen to enjoy "the tremendous advantages, both to themselves and to the general public, of combination, of cooperation and common action, with their natural competitors." *Id.* at 105.

[89] For an analysis of the failed movements during and after World War I to revise the antitrust laws, *see* Cuff, *supra* note 85, at 55-63; Himmelberg, *Business Antitrust Policy and the Industrial Board of the Department of Commerce*, 42 Bus. Hist. Rev. 1 (1968); Himmelberg, *The War Industries Board and the Antitrust Question in November 1918*, 52 J. Am. Hist. 59 (1965). For a discussion of postwar efforts by business and government to promote industry self-regulation and cooperation between the public and private sectors, see R. Himmelberg, The Origins of the NRA: Business, Government, and the Trade Association Issue, 1921-1933 (1976) [hereinafter cited as R. Himmelberg, Origins]; L. Galambos, Competition and Cooperation: The Emergence of a National Trade Association (1966).

[90] *See, e.g.*, A. Burns, The Decline of Competition 69-75 (1936); Hawley, *Herbert Hoover, the Commerce Secretariat, and the Vision of an 'Associative State,' 1921-1928*, 61 J. Am. Hist. 116, 139 (1974). Hoover's associationalism views should not be confused with the laissez-faire economic proclivities of two of his prominent contemporaries, Warren Harding and Calvin Coolidge. Their attitudes represent a distinct and independently important influence on the Commission's activities. *See infra* text accompanying notes 158-64.

[91] A. Burns, *supra* note 90, at 68-69; A. Schlesinger, *supra* note 73, at 84-85; Hawley, *supra* note 90, at 117-18.

[92] The Commission's *Annual Report* for 1928 commented:

> Never in the history of American business has there been a time when self-regulation has received more intensive consideration. . . .
>
> If an industry is capable of self-regulation, the trade practice conference procedure of the Federal Trade Commission affords the most effective method yet devised to accomplish this end. . . .
>
> Trade associations, "institutes," the United States Chamber of Commerce, and business organizations in other forms have done, and are doing, excellent work in this respect.

FTC, Ann. Rep. 5 (1928). *See* T. Cochran & W. Miller, The Age of Enterprise 345-46 (1961).

[93] *See* National Industrial Conference Board, Public Regulation of Competitive Practices 224-41 (1929); Kittelle & Mostow, *A Review of the Trade Practice Conferences of the Federal Trade Commission*, 8 Geo. Wash. L. Rev. 427 (1940).

commissioner and members of the agency's staff to discuss practices within the trade.[94] When a consensus of the conference participants opposed some business tactic, the conferees drafted resolutions banning the suspect practice. If the FTC approved the conferees' views, it classified the proposals as either "Group I" or "Group II" rules. The Commission treated violations of Group I rules as prima facie violations of the FTC Act and sought cease and desist orders to halt them. For Group II rules, the FTC based its decision to prosecute on the circumstances of each claimed infraction.

From several meetings per year in the early 1920's, the trade conference became the agency's dominant enforcement approach by the end of the decade.[95] Many commentators found the device a constructive means to understand business and promote commercial ethics without litigation.[96] For some, the FTC's reliance on the conferences displayed a healthy inclination to replace competition-preserving enforcement with associationalist policies.[97] For competition policy advocates, the conferences' effect hinged mainly on whether the FTC, in endorsing certain rules, was sanctioning collusion. Ultimately, the agency proved inadequately circumspect in this regard.[98]

The war mobilization and the associationalism experiments of the 1920's gave the central planners important, limited tests of their theories. The economic collapse of 1929, however, provided a dramatic opportunity to sweep the competition model aside, perhaps permanently. This movement reached its peak in the first administration of Franklin Roosevelt, whose early New Deal drew mainly upon the country's war mobilization and associationalism experiences to stimulate recovery.[99]

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[94] For a discussion of the FTC's trade practice conference procedure in the 1920's, see FTC, Trade Practice Submittals 1919 to 1923 (1923); McCarty, *Trade Practice Conferences*, 2 Corp. Prac. Rev. 19 (1930).

[95] T. Blaisdell, *supra* note 59, at 93-98. Blaisdell calculated that between 1919 and 1929 there were 83 trade practice conferences, including 60 between July 1927 and November 1929.

[96] *See, e.g.*, G. Henderson, *supra* note 59, at 82, 244; *National Industrial Conference Board*, *supra* note 93, at 241.

[97] In 1930, one former Commission official observed:

> The trade practice conference marks the beginning of systematic cooperative effort between various progressive industries and the government to establish and enforce intelligent rules of business conduct. It permits industries to become self-governing through responsible trade organizations whose activities are supervised in the public interest by the Federal Trade Commission . . . . It creates among business men a more enlightened sense of their responsibility to the public, and it creates . . . in the public a similar sense of its responsibility to permit business interests . . . to conduct business on sound economic principles of cooperative effort as distinguished from destructive competition.

McCarty, *supra* note 94, at 29.

[98] *See infra* text accompanying notes 169-75.

The country embarked upon an unprecedented program of peacetime economic planning in 1933 with the National Industrial Recovery Act (NIRA),[100] the cornerstone of recovery efforts until 1935. The statute created the National Recovery Administration (NRA) which obtained codes of fair practice from each industry. Under the NRA's often casual review, businessmen prepared and implemented codes covering, among other things, pricing and output.[101] By delegating power over price and production to industry trade groups, "the NRA created a series of private economic governments. . . . The large corporations which dominated the code authorities used their powers to stifle competition, cut back production, and reap profits from price-raising rather than business expansion."[102]

Following a brief surge of enthusiasm accompanying its creation, the NRA swiftly fell into disfavor. Internal conflict among the cooperation advocates undercut NRA attempts to execute a coherent policy and operate effectively.[103] At the same time, supporters of antitrust enforcement relentlessly assailed the agency as a conduit for cartelization.[104] By the time the Supreme Court struck down the NIRA in 1935,[105] the NRA seemed to be collapsing under its own weight. Until its official demise, however, the NIRA significantly affected the FTC's competition work.[106] Antitrust enforcement by the Commission and the Justice Department had virtually halted.[107] By the mid-1930's, according to one observer, the FTC's chief function had become "preventing false and misleading advertising in reference to hair restorers, anti-fat remedies . . . a somewhat inglorious end to a noble experiment."[108]

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[99] *See, e.g.*, E. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY (1966); R. HIMMELBERG, ORIGINS, *supra* note 89; W. LEUCHTENBURG, *supra* note 87, at 41-42.

[100] Act of June 16, 1933, ch. 90, 48 Stat. 195 (1933) (declared unconstitutional in Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)).

[101] C. PEARCE, NRA TRADE PRACTICE PROGRAMS (1939); A. SCHLESINGER, THE COMING OF THE NEW DEAL 119-35 (1958). Several industrialists, including Gerard Swope of General Electric, Walter Teagle of Standard Oil of New Jersey, and Myron Taylor of United States Steel, previously had urged the government to adjust production to demand. A. SCHLESINGER, *supra* note 73, at 181-82. The National Recovery Administration appears to have modeled its industry code program after the FTC's trade practice conference procedure. A. BURNS, *supra* note 90, at 463.

[102] W. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 1932-1940, at 69 (1963).

[103] The NIRA's passage masked formidable tensions among cooperation-oriented businessmen and public administrators who differed over the exact form such cooperation should take. E. HAWLEY, *supra* note 99, at 135-42.

[104] W. LEUCHTENBURG, supra note 102, at 67-68; A. SCHLESINGER, *supra* note 101, at 100-01, 130-35, 167-69.

[105] Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[106] One 1964 commentary called the NIRA "the greatest threat to the Federal Trade Commission in the Commission's entire fifty-year history." Lamb, *Counsel for the Defense*, 24 FED. B.J. 431, 432 (1964).

The restoration of antitrust as an important national policy began in the late 1930's. In his second term, Roosevelt gave greater credence to the thinking of Felix Frankfurter, Benjamin Cohen, and Thomas Corcoran who embraced the Brandeisian preference for active antitrust enforcement.[109] His appointment, in 1938, of Thurman Arnold as Assistant Attorney General triggered an unparalleled period of activity in the Antitrust Division. In five years, Arnold brought almost as many antitrust suits as the Division had in the previous fifty.[110] The FTC shared in this rejuvenation as well and began the most serious litigation initiative up to that time—a comprehensive assault upon base-point pricing.[111]

The antitrust revival in 1938 was a turning point for American competition policy. Although the World War II mobilization blunted many antitrust cases launched before 1942, the competition model would not again face a challenger as formidable as the cooperation and planning theories of the early New Deal. Competition policy emerged from the Depression with a degree of social support that made possible the comparatively stable, substantial government antitrust work of the post-war era.[112] While not all peacetime economic policy since 1938 has conformed to the competition model, competition policy has enjoyed comparatively broader support since 1938 than it did in the century's first decades. Thus, a recommendation in 1969 that the FTC strengthen its antitrust programs arguably had greater practical significance than one made forty years earlier.

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[107] *See* STAFF OF HOUSE SELECT COMM. ON SMALL BUS., 84TH CONG., 1ST SESS., REPORT ON STATISTICS ON FEDERAL ANTITRUST ACTIVITIES 3-4 (Comm. Print 1956).

[108] P. HERRING, *supra* note 69, at 115 (quoting Abram Myers, a commissioner from 1926 to 1929). Although an accurate appraisal of the agency's litigation efforts, Myers' remark understated the Commission's work in those years as a competition advocate. The FTC, for example, criticized the cartelizing proclivities of several NRA codes. E. HAWLEY, *supra* note 99, at 94-95, 108-09, 117; A. SCHLESINGER, *supra* note 101, at 171.

[109] W. LEUCHTENBURG, *supra* note 102, at 148-49, 154-56, 163. Throughout the decade Roosevelt had exasperated his advisors by entertaining a variety of views on an issue without committing himself firmly to any one of them. Describing the President's ambivalence on economic policy, Leuchtenburg wrote "[h]e preferred to let the rival theorists war around him. It was almost as though he were watching himself, uncertain in his own mind and rather curious about which faction would win him over." *Id.* at 249. *See* B. MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION 152-85 (1982).

[110] *See supra* note 107, at 3. Ironically, in 1937, Arnold had argued that antitrust was a charade that enabled the country to express harmlessly its indignation at the discomforting but ultimately necessary process of industrial concentration. T. ARNOLD, THE FOLKLORE OF CAPITALISM 96, 207-29 (1937).

[111] *See infra* text accompanying notes 198-208.

[112] R. HOFSTADTER, *supra* note 67, at 233; Lamb, *supra* note 106. "[T]he passing of the N.I.R.A. and the failure of Congress to enact any similar measure began a new era for the Federal Trade Commission, and for antitrust enforcement in general." *Id.* at 433.

2. Federal Judiciary

A second important external factor shaping FTC antitrust enforcement has been judicial review.[113] The judiciary's influence on the Commission's choice of competition programs emerged vividly in the courts' interpretation of the FTC's authority from 1914 to 1934. In creating an administrative agency to enforce the antitrust laws, Congress was seeking to ensure greater fidelity to its own competition policy goals.[114] The main impetus for this choice came from the Supreme Court's *Standard Oil Co. of New Jersey v. United States*[115] and *United States v. American Tobacco Co.*[116] decisions in 1911. The Court's adoption of the "rule of reason" standard showed Congress that the Sherman Act's effectiveness depended greatly upon how judges interpreted its general provisions.[117] Although some congressmen found the rule of reason standard to be substantively deficient, Congress' main concern in passing the FTC Act was with the process through which the antitrust laws would be interpreted.[118]

Under Congress' plan, the judiciary's role was essentially to determine whether the FTC's conclusions about the propriety of various business practices had evidentiary support. Courts were not to probe the wisdom of the Commission's choice among policy alternatives where the agency's preference had sufficient evidentiary support.[119] By this design, Congress intended the Commission to account primarily to it, not the courts, for its policy decisions. Senator Cummins described how the proposed FTC statute would distribute authority among the agency, the judiciary, and the legislature:

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[113] *See, e.g.*, T. Blaisdell, *supra* note 59, at 259-86; C. McFarland, Judicial Control of the Federal Trade Commission and the Interstate Commerce Commission, 1920-1930 (1933); Decker, *Unfair Competition and Federal Trade Commission*, 24 Fed. B.J. 513 (1964); Handler, *Unfair Competition and the Federal Trade Commission*, 8 Geo. Wash. L. Rev. 399 (1940).

[114] In this discussion of the institutional aims that moved Congress to create the FTC, the author has relied frequently upon Robert Lande's analysis of the goals of the FTC Act, R. Lande, The Goals of the Antitrust Laws (1981) (unpublished manuscript on file with the author); and Neil Averitt's study of section 5 in *Averitt*, *supra* note 13. For a brief recent summary, see ABA Antitrust Section, Monograph No. 5, The FTC as an Antitrust Enforcement Agency: The Role of Section 5 in the FTC Act in Antitrust Vol. I, at 20-25 (1981).

[115] 221 U.S. 1 (1911).

[116] 221 U.S. 106 (1911).

[117] *See* G. Henderson, *supra* note 59, at 15; *see also* J. Landis, The Administrative Process (1938):

> In the field of unfair competition and monopoly . . . there was widespread distrust of the courts' ability to evolve workable concepts to direct the economic forces which had posed these problems.
>
> . . . Here distrust based itself upon the belief that the men who composed our judiciary too often held economic and social opinions opposed to the ideals of their time. The distrust was not without foundation.

Id. at 32-34.

[118] *See* Averitt, *supra* note 13, at 233-34.

> I realize that if these five men were either unfaithful to the trust reposed in them or if their economic thought or trend of thought was contrary to the best interests of the people, the commission might do great harm. I realize that just as I realize that the trend of economic thought upon the part of some judges has done and will continue to do great harm, or rather will continue to render ineffective to a degree a statute that it was believed by its authors would exterminate the monopolies then in existence and prevent the establishment of others.
>
> I would rather take my chance with a commission at all times under the power of Congress, at all times under the eye of the people, for the attention of the people is concentrated to a far greater degree upon the commission which is organized to assist in the regulation of commerce or to administer the law regulating commerce than it has upon the abstract propositions, even though they be full of importance, argued in the comparative seclusion of our courts.
>
> If we find that the people are betrayed either through dishonesty or through mistaken opinion, the commission is always subordinate to Congress. . . . Congress can always destroy the commission; it can repeal the law which creates it . . . .[120]

In adopting a relatively narrow standard of judicial review, Congress also sought to supply the institutional means with which to enhance the stature of the FTC's work. In section 5 of the FTC Act, Congress had given the Commission the interpretational and adjudicatory responsibilities that traditionally had been the province of the courts.[121] Congress theorized that the Commission's principal tool for

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[119] *See supra* note 113.

[120] 51 CONG. REC. 13,047-48 (1914). For a review of the legislative debates concerning the scope of judicial review, see R. CUSHMAN, THE INDEPENDENT REGULATORY AGENCIES 201-04 (1941).

[121] The Senate Interstate Commerce Committee Report on the FTC Act explained the logic of this approach:

> The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and

overcoming judicial opposition to this intrusion would be its competition policy expertise. This expertise would have essentially three sources: The Commission's repeated exposure to antitrust problems;[122] the Commission's authority to employ specialists of various backgrounds;[123] and the Commission's extraordinary investigative and reporting powers.[124]

Congressional expectations received a serious blow in 1920 in the first Commission case to come before the Supreme Court, *FTC v. Gratz*[125]. Although the Court decided the case on a procedural issue, it proceeded to limit the Act's ban on "unfair method[s] of competition":

> The words "unfair method of competition" are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.[126]

As subsequently applied by the courts in the 1920's, *Gratz* virtually barred the Commission's development of antitrust principles not already established by judicial interpretation. Although the bare terms of *Gratz* were potentially generous in their implication that the Com-

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> to forbid [them] . . . or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define, and after writing 20 of them into law it would be quite possible to invent others.

S. REP. No. 597, 63d Cong., 2d Sess. 13 (1914). Experience with the Interstate Commerce Commission had shown that federal judges generally begrudged bestowing traditionally "judicial" functions upon an administrative body. C. MCFARLAND, *supra* note 113, at 102-124.

[122] G. HENDERSON, *supra* note 59, at 22. Senator Newlands expressed his expectation that:

> [A]s a result of investigation and as the result of long experience [the FTC] will build up a body of information and of administrative law that will be of service not only to [it] but to the country itself, and that gradually standards will be established that will be accepted and will constitute our code of business morals.

51 CONG. REC. 11,083 (1914).

[123] Congress contemplated that the Commission and its staff would be made up of businessmen and economists, as well as lawyers. *See* 51 CONG. REC. 11083, 12216, 13005 (1914).

[124] Both Blaisdell and Henderson described the powers conferred by §§ 6 and 9 of the FTC Act as "sweeping." T. BLAISDELL, *supra* note 59, at 112; G. HENDERSON, *supra* note 59, at 46.

[125] 253 U.S. 421 (1920).

[126] *Id.* at 427-28.

mission could cover areas "heretofore regarded as opposed to good morals . . . or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly,"[127] its practical effect deflected the FTC away from the pathbreaking initiatives which were a major reason for the agency's creation.[128]

The Supreme Court imposed a second damaging limitation on the FTC's powers in 1927 in *FTC v. Eastman Kodak Co.*[129] One year before *Kodak*, the Court had ruled section 7 of the Clayton Act inapplicable to asset acquisitions.[130] The Commission sued Kodak under section 5 to require the film company to divest three recently acquired processing plants. The Court ruled that the FTC lacked divestiture power under section 5.[131] By removing an essential remedy, the decision effectively prevented the Commission from plugging the Clayton Act's assets loophole[132] and, more generally, from having an important role in the areas of monopolization and attempted monopolization.[133]

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[127] *Id.* at 427. Some commentators regarded *Gratz* as excessively broad. *See* Montague, *Anti-trust Laws and the Federal Trade Commission 1914-1927*, 27 COLUM. L. REV. 650 (1927).

[128] During the legislative debates in 1914, Sen. Newlands had predicted that § 5 "will have such an elastic character that it will meet every new condition and every new practice that may be invented with a view to gradually bringing about monopoly through unfair competition." 51 CONG. REC. 12,024 (1914). Blaisdell summarized *Gratz's* impact as follows:

> In establishing its policies the Commission included in its definition the older ideas of the common law. To these, as occasion demanded, it endeavored to add other criteria. In connection with both criteria, the limiting hand of the law has been felt. But particularly in applying the latter group, based on other social and economic criteria, have the courts been adamant. They have insisted on limiting the Commission to standards previously found in the law.

T. BLAISDELL, *supra* note 59, at 21. Blaisdell supported his view by reviewing the outcome of appeals of FTC cases through 1928. He divided the cases into two classes, one in which the Commission had applied existing legal standards ("old criteria") and a second in which it had attempted to develop new law beyond the boundaries of earlier doctrine ("new criteria"). *Id.* at 40. He found that "[a] much higher percentage of those grouped under 'New Criteria' [had] been reversed by the courts than of those grouped under 'Old Criteria'." *Id.* at 41. He concluded that "[t]he Commission was apparently willing to broaden the scope of the law more rapidly than were the courts . . . . Concerning cases arising under the older standards . . . [t]he courts and the Commission [had] not disagreed seriously in their interpretations." *Id.*

[129] 274 U.S. 619 (1927).

[130] FTC v. Western Meat Co., 272 U.S. 554 (1926). As drafted in the original Clayton Act, § 7 prohibited consolidations achieved by stock purchases. Businesses quickly realized that they could escape the statute's reach by simply buying the target firm's assets. *See* G. HENDERSON, *supra* note 59, at 40, 321. Experience with § 7 seemed to confirm congressional apprehension in 1914 about delineating every offensive practice in the statute for fear that businessmen would merely circumvent the limitation with other devices.

[131] 274 U.S. at 623, 625.

[132] Following *Kodak* and *Western Meat*, the Commission continued to actively monitor major acquisitions and to investigate transactions that might fall within § 7's stock purchase prohibition. J. LANDIS, *supra* note 117, at 40-41.

[133] The Commission promptly acknowledged that *Kodak* had removed its power to order divestiture under § 5. *See, e.g.*, FTC, ANN. REP. 67 (1927). Without this structural remedy, the Commission's ability to deal effectively with firms that had achieved near or actual monopoly

Early court decisions also narrowly interpreted the FTC's investigative and reporting powers.[134] One set of cases barred investigations on the ground that the FTC had sought data on manufacturing production—two activities the courts of this era often treated as exclusively "intrastate" commerce, and thus beyond the FTC's jurisdiction.[135] A second, more important line of rulings prohibited the FTC from gathering information unrelated to alleged antitrust violations.[136]

There are two principal explanations for the generally unsympathetic treatment the Commission received from the courts during its first two decades. One is that the FTC failed to explain its decisions in full, narrative opinions and thus left the courts with little basis for upholding the agency's judgment.[137] It is doubtful, however, that the agency's cryptic opinions and other infirmities in its operations were the dominant cause of its failures on appeal. The second and probably dispositive factor was the judiciary's distaste for economic regulation by legislative or administrative decree.[138] Any attempt to classify judicial attitudes for a given era is prone to oversimplification, but it is not unreasonable to say that the Supreme Court viewed economic regulation more tolerantly after the 1930's and that this change led the courts

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power was severely diminished. *See* A. STONE, ECONOMIC REGULATION AND THE PUBLIC INTEREST 121-22 (1977).

[134] T. BLAISDELL, *supra* note 59, at 172, 258-62, 271-73; G. HENDERSON, *supra* note 59, at 67-70. In 1936, Arthur Burns observed that "judicial decision has whittled away [the Commission's] investigatory power, its right arm, until as Professor [Myron W.] Watkins has expressed it, 'There remains nothing but an impotent stump.'" A. BURNS, *supra* note 90, at vi (footnote omitted).

[135] *See, e.g.*, Claire Furnace Co. v. FTC, 285 F. 936, 942 (D.C. Cir. 1923), *criticized in* T. BLAISDELL, *supra* note 59, at 266-70; Handler, *The Constitutionality of Investigations by the Federal Trade Commission*, 28 COLUM. L. REV. 708, 714-20 (1928). The ruling in *Claire Furnace* rested upon the Supreme Court's holding in United States v. E.C. Knight Co., 156 U.S. 1 (1895) that manufacturing was not "commerce" for purposes of the Sherman Act.

[136] *See, e.g.*, FTC v. American Tobacco Co., 264 U.S. 298 (1924); United States v. Basic Prods. Co., 260 F. 472 (W.D. Pa. 1919); *see also* MacChesney & Murphy, *Investigatory and Enforcement Powers of the Federal Trade Commission,* 8 GEO. WASH. L. REV. 581, 588 (1940) ("Despite the language of the [FTC] Act, the courts have consistently refused to enforce the Commission's demands for information in the course of a general fact-finding inquiry unrelated to a specific breach of law"); Watkins, *An Appraisal of the Work of the Federal Trade Commission*, 32 COLUM. L. REV. 272, 278-80 (1932).

[137] The early commissioners refrained from writing complete narrative opinions, largely because they found the endeavor too time-consuming. Thompson, *Highlights in the Evolution of the Federal Trade Commission*, 8 GEO. WASH. L. REV. 257, 267-68 (1940). Henderson was the main exponent for this viewpoint. G. HENDERSON, *supra* note 59, at 117, 163, 334. Henderson suggested that the FTC's poor opinions were the major reason for its failings on appeal. *Id.* at 334.

[138] J. LANDIS, *supra* note 117, at 150. In Landis' words, the courts' willingness to defer to the FTC's administrative judgments in the 1920's was more "a matter of attitude in a particular case rather than of doctrine." *Id. See* T. BLAISDELL, *supra* note 59, at 289-90; C. MCFARLAND, *supra* note 113, at 92-99; Handler, *Unfair Competition and the Federal Trade Commission*, 8 GEO. WASH. L. REV. 399, 401-02 (1940).

to allow administrative tribunals greater latitude.[139]

Whatever their exact origin, the Supreme Court's interpretations of the Commission's substantive, remedial, and investigative authority seriously retarded the agency's development of a distinctive antitrust enforcement role.[140] The judicially imposed restrictions forced the Commission "to concentrate its energies within the narrow confines of the field of action set by the courts, and to refrain from a more experimental and venturesome exercise of its powers."[141] In the antitrust field, the FTC was left to work in terrain largely explored by the Justice Department.[142]

Since the 1920's, the courts have either reversed or substantially modified the limitations imposed by *Gratz*, *Kodak*, and other early decisions interpreting the agency's investigation and reporting powers.[143] By 1969, the agency had obtained Supreme Court rulings construing its authority in a manner generally consistent with congressional expectations in 1914. The Court's affirmation in the mid-1960's of the FTC's power to order divestiture under section 5, and its endorsement of a flexible conception of "unfair methods of competition" were particularly significant developments.[144] This judicial trend provided the ABA with reason to expect that its recommendations would receive consideration in an environment more favorable to ambitious FTC antitrust ventures than existed only a decade before.

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[139] The first important interpretations of the Sherman, Clayton, and Federal Trade Commission Acts took place in an era when the federal courts displayed a conservative attitude in reviewing congressional and state efforts to regulate business. *See, e.g.*, R. McCloskey, The American Supreme Court 136-79 (1960); A. Paul, Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895 (1960); B. Twiss, Lawyers and the Constitution (1942).

[140] These early rulings severely diminished the FTC's standing as a law enforcement agency, and injured the agency's efforts to attract competent leadership and staff. Arthur Burns warned that "An administrative body hampered as the Federal Trade Commission has been by the judiciary cannot attract able men." A. Burns, *supra* note 90, at 574.

[141] Handler, *supra* note 138, at 402; *see also* T. Blaisdell, *supra* note 59, at 36; C. Kaysen & D. Turner, Antitrust Policy 237 (1959); T. Lowi, The End of Liberalism 139 n.20 (1969).

[142] For example, the power to proscribe large asset acquisitions under § 5 of the FTC Act would have afforded the FTC at least the opportunity to develop a unique and influential antitrust enforcement role in the 1920's. *See* M. Handler, H. Blake, R. Pitofsky, & H. Goldschmid, Cases and Materials on Trade Regulation 431 (1975). The Commission's efforts to curtail misleading advertising in the 1920's and early 1930's are partly attributable to its inability to gain judicial acceptance for a broader reading of its antitrust authority. *See* Handler, *supra* note 138, at 405-06.

[143] *See, e.g.*, FTC v. Sperry & Hutchinson, 405 U.S. 233, 241-43 (1972). Pan Am. World Airways v. United States, 371 U.S. 296, 312 n.17 (1963); FTC v. Dean Foods Co., 384 U.S. 597, 606 n.4 (1966) (dictum) (rejecting *Kodak*); United States v. Morton Salt Co., 338 U.S. 632, 641-42 (1950); Averitt, *Structural Remedies in Competition Cases Under the Federal Trade Commission Act*, 40 Ohio St. L.J. 781, 788-94 (1979).

[144] *See* FTC v. Brown Shoe Co., 384 U.S. 316 (1966); FTC v. Dean Foods, 384 U.S. 597 (1966).

3. President

A more sympathetic judiciary in the 1920's alone would not have guaranteed that the early FTC would have used its authority more effectively. Much depended on the agency's leadership. The President and Congress share responsibility for selecting commissioners, but the President historically has been the dominant force in choosing the FTC's leadership.[145] White House attitudes toward antitrust have deeply affected the course of FTC competition programs. The Commission's first twenty years illustrate the importance of presidential antitrust preferences to FTC enforcement policy.

As a candidate and in the first two years of his presidency, Woodrow Wilson depicted himself as a foe of monopoly and special privilege. Soon after he signed the FTC Act, however, President Wilson's position toward business and antitrust turned to the right.[146] As a consequence, Wilson's first appointments to the Commission "gave dominance to men who had an anxious regard for the traditional concerns of business and finance."[147] To chair the new agency, he selected John Davies, a lawyer who had been Director of the Bureau of Corporations.[148] Wilson also chose George Rublee, an attorney and Wilson advisor, and three men with business backgrounds, Edward Hurley, William Harris, and Will Parry.[149]

The first Commission soon divided sharply over the direction it should take. Rublee and Harris favored antitrust litigation, while Hurley, Davies, and Parry preferred programs limited to advising businessmen of the legality of various anticipated acts.[150] The rift nearly paralyzed the agency. Seeking to establish a cordial relationship with the business community, the FTC did not issue its first complaint until February 1916, eleven months after it had officially opened its doors.[151] Upon Rublee's departure and Hurley's elevation to chairman in 1916, the agency acquired an even more conservative bent.[152] Hurley "devoted his talents to making the Commission useful to businessmen and to preaching the doctrine of co-operation between government and business. . . . [U]nder his leadership, the Commission practically abandoned its role as watchdog of business practices."[153] Although many of the FTC Act's original supporters had regarded the giving of guidance to business as worthwhile,[154] the degree to which Hurley stressed the FTC's purely advisory functions chagrined many who believed the agency's effectiveness as a promoter of competition policy rested heavily on the prosecution of antitrust suits.[155]

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[145] *See* J. GRAHAM & V. KRAMER, SENATE COMM. ON COMMERCE, 94TH CONG., 2D SESS., APPOINTMENTS TO THE REGULATORY AGENCIES: THE FEDERAL COMMUNICATIONS COMMISSION AND THE FEDERAL TRADE COMMISSION (1949-1974) (Comm. Print 1976).

[146] *See* J. BLUM, *supra* note 12, at 79-80 (observing that the collapse of the Progressive Party in the 1914 elections and the coming of war in Europe inclined Wilson "to reveal his basic faith in the heartfire of the conscience of men of wealth.").

[147] *Id.* at 80.

[148] Until 1950, the Commission chairmanship rotated annually among the commissioners. Since 1950, the President has designated the chairmen for all independent regulatory agencies. In 1950, James Mead became the first presidentially designated FTC Chairman. J. GRAHAM & V. KRAMER, *supra* note 145, at 10. For a discussion of the role of the chairman in directing the affairs of independent regulatory agencies in the modern era, see D. WELBORN, GOVERNANCE OF FEDERAL REGULATORY AGENCIES (1977).

[149] The tendency for lawyers to occupy all of the commissioner posts is a relatively recent phenomenon. The FTC's current chairman, James C. Miller, III, is the first non-lawyer to serve as a commissioner since James Mead, whose tenure ended in 1955. *Id.*

Wilson's appointments to the Commission in his second term aligned the agency more closely with the preferences of congressmen who expected the FTC to be an effective antitrust enforcer.[156] This shift, however, only partly compensated for the policies that guided the agency from 1915 to 1917. The first Commission's inability to pursue a substantial antitrust enforcement program made the FTC appear ill-suited to perform its assigned competition policy role.[157]

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[150] Herring, *The Federal Trade Commissioners*, 8 GEO. WASH. L. REV. 339, 344-45 (1940).

[151] G. HENDERSON, *supra* note 59, at 87; Rublee, *supra* note 79, at 671.

[152] Regarded as the most able of the early commissioners, Rublee served only an interim appointment after the Senate refused to confirm him for a regular term. Rublee had aroused the enmity of Senator Jacob Gallinger of New Hampshire by aiding Gallinger's opponent in the 1912 elections. Gallinger succeeded in blocking Rublee's confirmation for a full term. *See* Herring, *supra* note 150, at 344.

[153] A. LINK, 1910-1917, *supra* note 12, at 75. *See also* R. WEIBE, *supra* note 68, at 298. Hurley explained his enforcement approach in an address to the National Industrial Conference Board in July, 1916:

> I am glad to meet with a body of business men like you gentlemen, and I will plead guilty on the start by saying that I do not know anything about the law, and that applies to the Clayton act and to the Federal Trade Commission act. In my position on the Federal Trade Commission I am there as a business man. I do not mind telling you that when I was offered the place I told the President that all I knew was business, that I knew nothing about the new laws nor the old ones, and that I would apply the force that I might have in the interest of business. I have been there since the sixteenth of March last year, and I think that the businessmen of the country will bear me out when I say that I try to work wholly in the interest of business.

G. KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916, at 274-75 (1963) (footnote omitted).

[154] Many businessmen had supported the creation of a commission with specific statutory authority to advise firms in advance of the legality of their actions. *See* R. WEIBE, BUSINESSMEN AND REFORM 138-41 (1962).

[155] Brandeis later referred to Wilson's early appointments to the Commission as "a stupid administration." A. LINK, 1910-1917, *supra* note 12, at 74. Understandably, Wilson did not share this view. In the fall of 1916, he told a grain dealer's trade association, "It is hard to describe the functions of that Commission; all I can say is that it has transformed the Government of the United States from being an antagonist of business into being a friend of business." P. HERRING, *supra* note 69, at 112. These words may have been designed to convince businessmen that Wilson's tariff and antitrust legislation had not, as the Republicans claimed, been the source of the economic depression of 1914. *See* A. LINK, 1910-1917, *supra* note 12, at 74-75. Link points out that Wilson relaxed government antitrust enforcement efforts after 1914, initially to gain business favor and later to spur war mobilization. *Id.* at 74-76.

The 1920 election of Warren Harding as President augured the beginning of an unparalleled period of government solicitude for business interests.[158] During the terms of Harding and his immediate successors, Calvin Coolidge and Herbert Hoover, two lines of thought molded presidential antitrust policies. The first was the associational view of business-government cooperation born in the War Industries Board experience of World War I.[159] Most closely identified with Hoover, associationalism promoted greater industry "self-regulation" under the guidance of government which, with the advice of business, would coordinate economic activity. A second, distinct strand of thought saw government's proper role as serving the interests of business as businessmen defined them. Harding embraced this ideal, but it was Coolidge who became its foremost champion and "deliberately converted his administration into a 'businessman's government.' "[160]

Harding and Coolidge initially considered limiting the government's regulatory agencies, including the FTC, by modifying their statutory charters. Though no longer in control of the Congress, progressives in both houses had sufficient strength to make this seem a Pyrrhic route.[161] Consequently, Harding and Coolidge turned to devices more directly under presidential control, including their appointment power.[162] Early in the 1920's, the FTC was led by the last Wilson appointees, who had begun several major initiatives, including the agency's controversial study of the meatpacking industry in 1919.[163] With William Humphrey's appointment to the FTC in 1925, however, Coolidge achieved a working majority of commissioners who shared his views on the correct relation of government to business.[164]

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[156] *See* Herring, *supra* note 150, at 346-49.

[157] A. LINK, 1910-1917, *supra* note 12, at 75. *See also* Herring, supra note 150, at 345.

[158] Blaisdell described the transition in these terms:

> Near the end of President Wilson's term of office the attitude of the public towards government regulation of business underwent a change. The trend of opinion as expressed by the shift in political control from Democratic to Republican forces was reflected in the changed policies of the Commission. This changed attitude may be roughly expressed as a change from less governmental control of business to more business control of government.

T. BLAISDELL, *supra* note 59, at 75; *see also* P. HERRING, *supra* note 69, at 125-38 (tracing the liaison of business and politics in American history); J. HICKS, REPUBLICAN ASCENDANCY, 1921-1933, at 64-66 (1960) (appointments to federal agencies expressing conservative trend). Arthur Link cautions that the Harding administration's regulatory policies constituted a change in degree from Wilson's views rather than an abrupt break. Link, *Whatever Happened to the Progressive Movement in the 1920's?*, 64 AM. HIST. REV. 833, 848-49 (1959). For a discussion of government antitrust policy in the 1920's, see R. HIMMELBERG, ORIGINS, note 89 *supra*.

[159] *See supra* text accompanying notes 85-98.

[160] W. LEUCHTENBURG, *supra* note 87, at 96. To Coolidge, business ideas formed a secular creed that inspired the nation's greatest achievements. "The man who builds a factory builds a temple," and "[t]he man who works there worships there." A. SCHLESINGER, *supra* note 73, at 57. William Leuchtenburg cautions that it would be incorrect to assume that the views of Coolidge and his advisors did not have the backing of a large segment of the American public. "The Coolidge era is usually viewed as a period of extreme conservatism, but it was thought of at the time as representing a great stride forward in social policy, a New Era in American life." W. LEUCHTENBURG, *supra* note 87, at 201. *See also* E. GOLDMAN, *supra* note 73, at 220-47.

As commissioner, Humphrey publicly denigrated the policies the agency had followed from the end of World War I until his appointment and declared his intention to "help business help itself."[165] Under Humphrey's influence, the Commission imbued its enforcement programs with the values of Coolidge and the associationalists. One important step was the increased use of trade practice conferences.[166] In theory, the trade practice device provided a useful tool for addressing industry-wide abuses and learning about business first-hand.[167] Information from the conferences could also guide the FTC's selection and prosecution of cases.[168]

From an antitrust perspective, however, the Commission's actual use of the technique was less encouraging. Several observers, including advocates of the conferences, urged the FTC to balance conferences with formal, binding litigation.[169] By the late 1920's, however, the trade practice conference had become the agency's dominant antitrust enforcement strategy, and the extreme retreat from formal litigation had diminished the Commission's enforcement credibility.[170] A second, and more serious, problem was the content of the trade practice codes. From their inception in 1919, the codes' potential for fostering anticompetitive alliances was widely recognized.[171] Toward the end of the 1920's, the Commission was routinely approving codes that effectively sanctioned price fixing and other horizontal trade restraints.[172] Some codes so alarmed the Justice Department that in 1930 it called for the FTC to rescind provisions that seemed to violate section 1 of the Sherman Act.[173] The Commission responded by reevaluating the codes[174] and eventually deleting the suspect provisions.[175]

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[161] W. LEUCHTENBURG, *supra* note 87, at 97.

[162] J. HICKS, *supra* note 158, at 64-66; A. SINCLAIR, THE AVAILABLE MAN 251-52 (1965).

[163] *See infra* text accompanying notes 187-97.

[164] *See generally* Davis, *The Transformation of the Federal Trade Commission, 1914-1929*, 49 MISS. VALLEY HIST. REV. 437 [illegible]62) (significance of Humphrey's appointment).

[165] P. HERRING, *supra* note 69, at 125. In a 1931 speech, Humphrey criticized the FTC's prior litigation policy:

> Under the old policy of litigation it became an instrument of oppression and disturbance and injury instead of a help to business. It harassed and annoyed business instead of assisting it. Business soon regarded the commission with distrust and fear and suspicion—as an enemy. There was no cooperation between the commission and business.

Id.

Analyzing Humphrey's public comments, Herring wrote in 1936:

> It is not that these declarations are particularly cogent or marked by profundity of thought; it is rather that they reflect in bald and obvious form the prevailing views of the conservative leaders in his party and in business at the time. The shifting of political fortunes had brought a combination of groups into control whose leaders expressed theories very different from the Wilsonian disciples of the New Freedom. Big business had become more than respectable.

Id. at 125-26.

[166] *See supra* text accompanying notes 93-98.

[167] *See supra* note 96; G. HENDERSON, *supra* note 59, at 82, 244; A. STONE, *supra* note 133, at 58-59.

[168] *See* T. BLAISDELL, *supra* note 59, at 46-55.

Humphrey's influence also emerged in new FTC rules of procedure adopted soon after his appointment.[176] Among the most important were (1) a declaration that the agency would settle all cases informally "except when the public interest demands otherwise;"[177] and (2) a commitment that the FTC would neither announce the issuance of complaints "until after final determination of the case," nor make public matters settled informally before a complaint was filed.[178] In Humphrey's tenure, the rules reduced the number of compulsory enforcement proceedings and kept many formal complaints and consent agreements out of the public eye.[179]

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[169] G. HENDERSON, *supra* note 59, at 244. ("Experience has shown, however, that these informal proceedings cannot be relied upon exclusively.")

[170] *See* T. BLAISDELL, *supra* note 59, at 93-98; P. HERRING, *supra* note 69, at 129-31. Use of the conferences reached its peak in the winter of 1929-30, when 57 were convened. *Id.* at 130.

[171] G. HENDERSON, *supra* 59, at 81 ("it is obvious that an embarrassing situation might arise if a meeting should get out of bounds and discuss some forbidden topic.").

[172] Arthur Schlesinger gives the following description of the codes' operation: "Though dedicated to the elimination of "unfair" trade practices, the codes gradually began to spill over into such questions as price-cutting and, in some cases, provided fronts behind which businessmen fraternally conspired to evade the antitrust law." A. SCHLESINGER, *supra* note 73, at 65; see also J. CLARK, THE FEDERAL TRUST POLICY 231-32 (1931) ("The industrialists persisted . . . in their effort to exploit the opportunity they found in the trade practice conference to temper the warfare of industrial competition and they were successful in devising euphemisms for trade-restraining agreements which escaped the attention of the commission . . ."); T. BLAISDELL, *supra* note 59, at 95-96; T. COCHRAN & W. MILLER, *supra* note 92, at 346, 348; E. GOLDMAN, *supra* note 73, at 237; P. HERRING, *supra* note 69, at 131-32; W. LEUCHTENBURG, *supra* note 87, at 190 (1958); Kittelle & Mostow, *supra* note 93, at 436-38.

[173] *See* P. HERRING, *supra* note 69, at 132; *see also* J. CLARK, *supra* note 172, at 240-42; R. HIMMELBERG, ORIGINS, *supra* note 89, at 93-98.

[174] T. BLAISDELL, *supra* note 59, at 95-96; P. HERRING, *supra* note 69, at 131; J. CLARK, *supra* note 172, at 234; R. HIMMELBERG, ORIGINS, *supra* note 89, at 96-98.

[175] E. HAWLEY, *supra* note 99, at 39; P. HERRING, *supra* note 69, at 131-32.

[176] T. BLAISDELL, *supra* note 59, at 82-86.

[177] FTC, ANN. REP. 111 (1925).

[178] *Id.* This rule applied even to cases involving fraud and misrepresentation. P. HERRING, *supra* note 69, at 129.

For members of Congress who supported active FTC antitrust enforcement in the 1920's, the appointment and confirmation of commissioners with little sympathy for the statute's original aims was a searing disappointment.[180] Some found the Humphrey Commission so disturbing that they called for the agency's abolition.[181] Humphrey's tenure, however, had graphically demonstrated how appointments could set the tone and content of Commission policies. To many commentators, the FTC's ineffectiveness in its first two decades was caused by the successful efforts of the President and, on occasion, of the Congress to restrain the agency's pursuit of the competition policy goals of the 1914 statute.[182] The Commission's experience in this era firmly supported the ABA's conclusion in 1969 that the FTC's antitrust revitalization would require the willingness of the White House to appoint, and of the Senate to confirm, commissioners who preferred a forceful antitrust role.

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[179] T. BLAISDELL, *supra* note 59, at 85. "The coming of Humphrey to the commission meant that private negotiation with concerns accused of unfair methods was substituted for the former policy of prosecution." P. HERRING, *supra* note 69, at 129. Two commissioners, John Nugent and Huston Thompson, dissented vehemently to the publicity limitations on the ground that they deprived the agency of an important means of deterring anticompetitive behavior. Davis *supra* note 164, at 448-49.

[180] Reflecting on Humphrey's first year in office, Senator Norris lamented, "[i]t seems to me that if the commission is to function, if it is to continue to perform the work that the law designed it to perform, its personnel must be of men who believe in that kind of a law." 67 CONG. REC. 5962 (1926).

[181] Senator King sponsored a bill to achieve this end, declaring that the FTC was "not only a useless appendage, but . . . a real menace." Davis, *supra* note 164, at 453-54. Senator Connally said the agency had become "a city of refuge to which the guilty may flee, a sanctuary for those who violate and defy the laws of the United States." *Id.* at 453.

Humphrey remained a commissioner until 1933 when President Roosevelt removed him from office. Humphrey's estate eventually persuaded the Supreme Court that Humphrey's dismissal had been improper. Humphrey's Executor v. United States, 295 U.S. 602 (1935). Harold Ickes, Roosevelt's Interior Secretary, later said that Roosevelt had claimed to have proof of actual misconduct by Humphrey, but had believed he could remove Humphrey without such disclosures. H. ICKES, THE SECRET DIARY OF HAROLD L. ICKES: THE FIRST THOUSAND DAYS 1933-36, at 374 (1953).

[182] Blaisdell, for example, concluded:

> [T]he most important reason for the Commission's impotence lies in the drift of economic forces as they impinged on the political machinery. The struggle between "big business" and those economic groups which desired the control of "big business" by securing the control of the personnel and the policies of the Commission finally produced a governmental agency which would cooperate with business instead of regulate business. At best the remodelled Commission would regulate business in accordance with the ideals of business men.

T. BLAISDELL, *supra* note 59, at 289-90. The other major obstacle, in Blaisdell's view, was "the Commission's challenge to governmental control as administered by the courts." *Id.* at 290.

4. Congress

A fourth major external factor affecting the FTC's competition programs is Congress.[183] Through oversight, appropriations, and efforts to amend the agency's charter, Congress has significantly influenced the Commission's choice and execution of antitrust matters. As a general rule, the FTC has successfully pursued few economically significant initiatives that lacked legislative approval. Fulfilling the active antitrust role Congress envisioned in 1914 has always run the risk of provoking business to seek legislative relief from the agency's actions.[184] The FTC Act and its legislative history defined the nominal boundaries of the Commission's authority, but each new Congress determines how far the agency may go in exercising its powers.[185]

The political risk inherent in translating the broad mandate of 1914 into specific enforcement initiatives is evident in two past FTC competition projects, each the most ambitious and visible Commission initiative of its time: the meatpacking industry report of 1919, and the *Cement Institute* base-point pricing case of the 1940's. The meatpacking report controversy involved the use of the agency's investigation and reporting powers.[186] In 1917, President Wilson requested the FTC to investigate the food industry as part of a wartime price study. Despite vigorous lobbying by meatpacking firms to avoid the food inquiry, the Commission comprehensively examined the packing business.[187] The investigation yielded a six-volume report,[188] which presented evidence of collusion among the nation's five largest packers and numerous exclusionary tactics to thwart new competitors.[189] The Commission's recommendations included proposals for requiring the packers to relinquish control of stockyards and restricting their activities in unrelated product lines.

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[183] The preceding sections already have touched upon congressional influence upon FTC antitrust activities. Significant examples include passage of the NIRA in 1933 and Humphrey's confirmation in 1925. In their study of appointments to the FTC and Federal Communications Commission, Graham and Kramer found that Congress historically has deferred to Executive Branch judgment in reviewing appointments. *See* J. GRAHAM & V. KRAMER, *supra* note 145. There have been notable exceptions to this proposition, however, such as the Senate's refusal to confirm Rublee to a full term in 1915. *See supra* text accompanying note 152.

[184] In 1936, Herring described this condition:

> It seems apparent that from the beginning the commission was in a precarious position, for not only were its legal powers vague and its resources inadequate, but its relations with Congress were uncertain. The parties coming within its jurisdiction were often very powerful. The more important the business, the wider its ramifications, and the more numerous its allies and subsidiaries, the closer it came within the commission's responsibility. To review the firms with which this agency has had official contacts, especially in its early years, is to go down the roster of business in this country. Making political enemies was soon found to be an incident in the routine of administration. The discharging of official duties meant interfering with business and often "big business."

P. HERRING, *supra* note 69, at 115. *See also* R. CUSHMAN, *supra* note 120, at 219 ("The authority to investigate . . . mammoth business concerns . . . is a power loaded with political dynamite. It is bound to arouse the bitter antagonism of those being investigated and to set in motion powerful political pressures.").

[185] "Only with strong political support can the Federal Trade Commission consistently administer its statutory responsibilities." P. HERRING, *supra* note 69, at 116. Daniel Baum described Congress' role since 1914 as one of continually restating and defining the FTC's mandate:

> The question no longer is . . . what the agency acting independently has the power to do under statute, but rather, recognizing the sweep of its power, how far the agency can go without incurring the wrath of Congress . . . . [T]he direction taken by the Commission in the performance of its obligations must be done with an eye toward the Congress.

Baum, *Antitrust Functions of the Federal Trade Commission: Area Discrimination and Product Differentiation*, 24 FED. B.J. 579, 600 (1964).

The study quickly stimulated impassioned debate in Congress.[190] After months of hearings and discussion, Congress passed the Packers and Stockyards Act of 1921 which gave the Agriculture Department exclusive jurisdiction over the operation and practices of meatpackers, stockyards, and livestock commission houses.[191] Congress' vesting of authority over the packers in the Agriculture Department had an immediate, demoralizing effect on the FTC.[192] For the longer term, however, the meatpacking incident prompted Congress to keep the agency's economic work on a shorter appropriations leash.[193] This reduced the number of economic investigations ordered by Congress,[194] and left the FTC to initiate an increasing proportion of its own economic studies.[195]

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[186] 15 U.S.C. §§ 46, 49 (1976). Congress expected the Commission to use the information it secured through these powers in two ways. The first was to provide advice to Congress and the President on antitrust matters and to release data whose publication alone might correct market imperfections. The House Report on the FTC Act, for example, anticipated that publication of high business profits would attract entry into lucrative markets and depress prices. H.R. Rep. No. 553, 63d Cong., 2d Sess. 3-4 (1914). The second purpose was to improve the empirical basis upon which the Commission selected its antitrust enforcement priorities and developed cases. The mere fact that the agency exercised such powers might by itself deter violations. See T. Blaisdell, *supra* note 59, at 113-14.

[187] P. Herring, *supra* note 69, at 118; *see also* T. Blaisdell, *supra* note 59, at 188-91.

[188] The report was submitted to President Wilson in summary form in 1918 and presented to Congress in its entirety in 1919. P. Herring, *supra* note 69, at 118.

[189] *See* H.R. Doc. 1297, 65th Cong., 2d Sess. (1918); *Food Investigation: Report of the Federal Trade Commission on the Meatpacking Industry, Summary and Part I (Extent and Growth of the Five Packers In Meat and Other Industries)* (1919). The five leading packers were Swift, Armour, Morris, Wilson, and Cudahy. P. Herring, *supra* note 69, at 119.

[190] Reaction to the report provided "a concrete illustration of the political and administrative problems involved in attempting to regulate a powerful industry." P. Herring, *supra* note 69, at 118. Herring explained: "The sweeping character of this investigation and the bold changes suggested caused a political backfire almost fatal to the Commission. Five federal officials aroused the enmity of five great meat packers and the battle was on." *Id.* at 119. Senator Watson, a leading advocate of the packers, called for an investigation of the Commission employees who conducted the study. Watson said that the FTC's Chicago headquarters were "centers of sedition and anarchy . . . a nesting place for socialists, a spawning ground for sovietism." 58 Cong. Rec. 7169 (1919). The Commission investigated and exonerated the employees in question, but dismissed them nonetheless, a move widely seen as an effort to placate Watson. See T. Blaisdell, *supra* note 59, at 78-79; P. Herring, *supra* note 69, at 119.

[191] 7 U.S.C. §§ 181-229 (1976). "The packers were desirous of getting from under the jurisdiction of the Federal Trade Commission. They seemed to feel that they would receive more sympathetic treatment from the officials in the Department of Agriculture." P. Herring, *supra* note 69, at 120. *See also* T. Blaisdell, *supra* note 59, at 194; Davis, *supra* note 164, at 441; J. Landis, *supra* note 117, at 112-13.

Decreasing congressional involvement in the initiation of the FTC's economic work had important political implications. Historically, the least politically vulnerable FTC investigations and studies had been those begun at the request of Congress.[196] On the other hand, studies begun at the President's request or by the Commission itself more often provoked congressional efforts to limit the agency's authority.[197]

A second arena in which Congress has significantly affected the Commission's choice of competition programs is litigation. An outstanding example is Congress' effort in the early 1950's to overturn the result in *Federal Trade Commission v. Cement Institute*.[198] During the antitrust revival of the late 1930's, the Commission made base-point pricing its principal antitrust litigation priority.[199] The main product of this program was *In re Cement Institute*,[200] in which the agency ordered the members of the cement producers' national trade association to abandon a multiple base-point pricing system. The Seventh Circuit Court of Appeals reversed the Commission,[201] but the Supreme Court reinstated the agency's order.[202]

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[192] Davis, *supra* note 164, at 441.

[193] Formal congressional efforts to retrench the Commission's economic work began in the middle and late 1920's with proposals to cease or sharply limit funding for the agency's economic division. R. CUSHMAN, *supra* note 120, at 220. Spearheading this movement was Rep. Wood, Chairman of the House Appropriations Subcommittee for Independent Offices, who said that the Commission's chief economist, Francis Walker, did little but "promulgate a lot of wild-eyed theories and idealism." P. HERRING, *supra* note 69, at 128. In 1933, Congress barred the FTC from beginning new investigations pursuant to legislative resolutions unless the requests were in the form of concurrent resolutions. *See* Stevens, *The Federal Trade Commission's Contribution to Industrial and Economic Analysis: The Work of the Economic Division*, 8 GEO. WASH. L. REV. 545, 549-53 (1940). The restrictions did not stem entirely from the legislature's disapproval of the FTC's work. In the 1920's, the Senate had ordered most of the FTC investigations begun by congressional request. The Senate, however, had no authority to originate appropriations bills, and the House was left in the disagreeable position of supplying funds for projects it had no hand in devising. This situation irritated members of the House Appropriations Committee.

[194] *See* MacIntyre & Volhard, *The Federal Trade Commission*, 11 B.C. INDUS. & COM. L. REV. 723, 755-56 (1970). Through 1933, Congress or the President had originated most of the Commission's general studies. *See* FTC ANN. REP. 203-24 (1939).

[195] Stevens, *supra* note 193, at 553. In 1970, MacIntyre estimated that before 1933 some 43 investigations had been initiated by a resolution of the Senate and 5 by the House. Only 3 were requested between 1933 and 1938, and none were sought from 1938 to 1970. MacIntyre & Volhard, *supra* note 194, at 755.

[196] The FTC's study of electric and gas utility holding companies, which followed a Senate Resolution, is a noteworthy example. *See* FTC, SUMMARY REPORT ON HOLDING AND OPERATING COMPANIES OF ELECTRIC AND GAS UTILITIES, S. DOC. NO. 92, Pt. 73-A, 74th Cong., 2d Sess. 59-76 (1935) (presenting a history of the FTC Study and its conclusions and recommendations).

[197] The meatpacking study was performed at President Wilson's request. Two other examples also illustrate this trend. In 1952, President Truman asked the FTC for a comprehensive study of consumer expenditures. Congress promptly barred the Commission from spending any funds on such a study. *See* Boyle, *Economic Reports and the Federal Trade Commission: 50 Years' Experience*, 24 FED. B. J. 489, 501 (1964). Similarly, in 1963 the Commission's Bureau of Economics proposed a study of the nation's 1000 largest firms. Congress banned any expenditure of the agency's funds on that venture as well. *Id.*; M. GREEN, THE CLOSED ENTERPRISE SYSTEM 59, 369-70 (1972).

The Court's ruling triggered instant demands from cement industry officials that Congress declare base-point pricing legal.[203] Congress considered several bills designed to overturn *Cement Institute*[204] and closely questioned the Commission about its future enforcement plans.[205] The climax came in June, 1950 when Congress passed the

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[198] 333 U.S. 683 (1948). *See, e.g.*, C. Edwards, The Price Discrimination Law 400-38 (1959); E. Latham, The Group Basis of Politics (1952); Latham, *The Politics of Basing Point Legislation*, 15 Law & Contemp. Prob. 272 (1950); Wallace & Douglas, *Antitrust Policies and the New Attack on the Federal Trade Commission*, 19 U. Chi. L. Rev. 684 (1952).

[199] Staff of Subcomm. on Monopoly of the House Comm. on Small Business, 79th Cong., 2d Sess., Report on United States Versus Economic Concentration and Monopoly 27 (Comm. Print 1946). The FTC's assault upon base-point pricing began in the early 1920's. *See, e.g., In re* United States Steel Corp., 8 F.T.C. 1 (1924).

[200] 37 F.T.C. 87 (1943) (the Commission had filed the complaint in 1937).

[201] Aetna Portland Cement Co. v. FTC, 157 F.2d 533 (7th Cir. 1946).

[202] FTC v. Cement Institute, 333 U.S. 683 (1948). Justice Black's majority opinion emphasized the Commission's extensive earlier work with the problem of base-point pricing. "We are persuaded that the Commission's long and close examination of the questions it here decided has provided it with precisely the experience that fits it for performance of its statutory duty." *Id.* at 720. More than a purely mechanical deference to an abstract concept of administrative expertise, this comment reflected an appreciation for the FTC's knowledge in this field. The remark underscored the "textbook quality" of the agency's base-point pricing program. As Congress, in 1914, had expected it would, the Commission built the *Cement Institute* lawsuit upon careful economic and legal analysis. Although the practice in question had many apologists, this seemed the type of complex issue and enforcement approach for which Congress created the agency.

[203] Wallace & Douglas, *supra* note 198, at 694-95; Latham, *supra* note 198, at 273-77. Joining ranks with the cement industry were the country's steelmakers, which also were losing an FTC basing-point suit. *See* Triangle Conduit & Cable Co. v. FTC, 168 F.2d 175 (7th Cir. 1948), *aff'd by an equally divided Court sub nom.* Clayton Mark & Co. v. FTC, 336 U.S. 956 (1949).

[204] The bills are discussed in chapters 2-5 of E. Latham, *supra* note 198, at 54-208. For a sympathetic treatment of these measures by the General Counsel of the Senate Special Subcommittee on Pricing, see Simon, *The Case Against the Federal Trade Commission*, 19 U. Chi. L. Rev. 297 (1952). For a rebuttal of Simon's views, see Wallace & Douglas, *supra* note 198.

[205] *S. 236: Hearings Before the Subcomm. on Pricing of the Senate Comm. on Interstate and Foreign Commerce*, 81st Cong., 1st Sess. (1949); Interim Report on the Study of the Federal Trade Commission Pricing Policies, S. Doc. No. 27, 81st Cong., 1st Sess. (1949). In his 1964 article, Baum described the purpose of the hearings as follows:

> Here was no deliberate, careful study of Commission and court interpretation. Rather, the hearings held were used to achieve two hurried ends; (1) the exertion of pressure to force the Commission to back down, and not enforce the rulings of the Court, and (2) the enactment of legislation which would soften existing antitrust laws.

Baum, *supra* note 185, at 597.

O'Mahoney Freight Absorption Act which effectively overturned *Cement Institute*.[206] With the FTC's urging, President Truman vetoed the bill, and later efforts to revive the measure failed.[207]

Although the O'Mahoney proposal failed, its narrow defeat exposed the precariousness of FTC lawsuits involving substantial economic stakes but lacking either the active support, or, at a minimum, the tolerant acquiescence of Congress. Clair Wilcox, the economist and business historian, summarized the lessons of the *Cement Institute* controversy for future economically significant FTC antitrust initiatives:

> An administrative agency . . . is peculiarly vulnerable to political attack. If inert, lenient, and ineffective, its placid existence may be undisturbed. But if vigorous in the performance of its duties, it will be headed for trouble. Its powers may be curtailed, its appropriation slashed, its administrators refused confirmation, its personnel subjected to persecution, its very existence jeopardized.
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> . . . .
>
> If the Federal Trade Commission comes to grief, it will not be because it has been too lax, but because it has been too tough. If it values survival, an agency thus attacked is likely to draw in its horns.[208]

C. *Implications for FTC Competition Programs*

Lassitude, as Wilcox suggested, may be the most reliable path to long-run institutional survival for administrative agencies with politically sensitive law enforcement responsibilities. In 1969, however, the pervasive perception of FTC "inertness, leniency, and ineffectiveness" posed the greatest threat to its well-being.[209] The ABA Report proposed that the FTC satisfy three broad criteria in choosing competition initiatives: First, limit its resources to projects with genuine economic significance;[210] second, concentrate on matters involving unsettled legal doctrine and requiring complicated economic analysis; third, resort more to compulsory enforcement proceedings.

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[206] S. 1008, 81st Cong. 2d Sess. (1950).

[207] C. Edwards, *supra* note 198, at 430-32; Simon, *supra* note 204, at 323; Wallace & Douglas, *supra* note 198, at 693.

[208] C. Wilcox, Public Policies Toward Business 259-60 (1955). John Blair, who directed the FTC's Bureau of Economics in the early 1950's, wrote in 1964 that "[t]he agonies that the Commission went through in trying to justify its attack upon the basing-point system . . . left a scar which will long remain." Blair, *Planning for Competition*, 64 Colum. L. Rev. 524, 525 (1964). Similarly, Baum noted:

> The storm following the *Cement* case left destruction and with it a message . . . : The will of Congress cannot be ignored; statutory power must, at times, be exercised in a political context. The question is not always what the Commission can in theory do, but, rather what it can in reality accomplish. This calls for the agency to be aware of the mood of Congress, and, more precisely the measure of opposition to proposed policy decisions.

Baum, *supra* note 185, at 606 (footnotes omitted).

[209] *See* Nader Report, *supra* note 16. The Report mainly discussed the Commission's consumer protection activities, but its criticisms frequently applied to the agency as a whole. Devot-

A central feature of the ABA criteria was their tendency, if closely followed, to have the Commission draw increasingly from the risk-laden end of the spectrum of all possible antitrust programs and enforcement methods. Each guideline advanced a change from "trivial" to economically important programs, from per se offenses to complex, unsettled areas of law and economics, from voluntary to compulsory enforcement—that would replace a safer approach with a riskier one.[211] To succeed in a comparatively higher risk role, the Commission needed to pursue the ABA's suggested internal reforms. The agency's own substantive skills and political acumen would be important in determining whether the agency developed meritorious programs and executed them without provoking serious collateral political attack.[212] However, the success of the ABA's proposals also depended as much on the attitudes of Congress, the President, the judiciary, and the nation at large as it did on the FTC's skill in pursuing them.[213]

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ing "its dwindling energies to the prosecution of the most trivial cases," the FTC was "engaged in active and continuing collusion with business interests—particularly big-business interests." *Id*. at 45, 121. The Nader Report added that "[m]isguided leadership is the malignant cancer that has already assumed control of the Commission, that has been silently destroying it, and that has spread its contagion on the growing crisis of the American consumer." *Id*. at 130. The agency's work, it concluded, amounted to a "betrayal of the public interest." *Id*. at 59. In 1972, the Nader organization published an equally unflattering analysis of federal antitrust enforcement and the FTC's competition programs. *See* M. Green, *supra* note 197.

[210] ABA Report, *supra* note 10, at 37, 68.

[211] The risk comes in mainly two forms. The first is that the Commission will win fewer cases as it brings more lawsuits affecting high economic stakes and dealing with complex, unsettled areas of law and economics. Effective litigation strategy suggests that respondents will contest economically significant suits vigorously and encourage judicial officers to shun applications of "novel" economic theory and avoid apparent departures from existing legal doctrine. The second risk consists of the possibility that enforcement programs affecting substantial economic interests will spur affected firms to seek intervention by Congress or the President on their behalf, particularly where the Commission's action rests upon unsettled legal or economic theories.

[212] As the modern political science literature indicates, political adroitness is as important to the success of an administrative agency's programs as technical proficiency. F. Rourke, Bureaucratic Power in National Politics 2 (1972). "[E]ach agency must constantly create a climate of acceptance for its activities and negotiate alliances with powerful legislative and community groups to sustain its position. It must, in short, master the art of politics as well as the science of administration." *Id.*

[213] Richard Posner's dissent to the ABA Report argued that the career interests of FTC Commissioners alone made it extremely unlikely that the agency would begin or sustain politically risky programs.

> It has been proposed as a reasonable hypothesis that regulators motivated by self-interest act so as (a) to retain their jobs and (b) to obtain greater appropriations for their agency

In recommending that the FTC retain its antitrust powers, the ABA seems to have perceived that institutions outside the agency were amenable to the risk-taking its guidelines implicitly required. The ABA Committee appeared to believe that the President and Congress would play the most important role in determining the form and content of the FTC's antitrust work. The preferences of the Executive Branch would emerge through its selection of Commissioners, particularly the Agency's Chairman.[214] Whether Congress wanted the FTC to assume the ABA's suggested antitrust role would become apparent in several ways: The demands Congress placed upon nominees to the Commission; the types of competition programs the oversight and appropriations committees urged the FTC to pursue; the breadth and durability of congressional backing for specific initiatives to implement Congress' broad preferences; and appropriations.[215] The actual re-

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> as a way of augmenting personal power (and frequently remuneration as well). This assumption seems reasonable as to those commissioners who seek reappointment and those members of the staff who make a career of government service. . . .
>
> Not every commissioner or staff member makes a career of government service, however . . . . A commissioner concerned with his future success at the bar will have no greater incentive to promote the consumer interest fearlessly and impartially than one whose guiding principles are job retention and agency aggrandizement . . . . Exceptional people may rise to the challenge but they are unlikely ever to constitute a sizeable fraction of commissioners.

ABA REPORT, *supra* note 10, at 116-17 (footnotes omitted). The FTC's antitrust work since 1969 hardly supports Posner's thesis that managerial and career goals will deter a majority of commissioners from pursuing politically risky programs. *See* R. KATZMANN, *supra* note 63, at 183-85.

[214] This Article does not analyze the appointment of commissioners by the Executive Branch in the decade following the ABA Report. As a group, these appointments placed the agency's leadership in the hands of individuals who shared many of the ABA's views and were committed to revitalizing the agency. *See* J. GRAHAM & V. KRAMER, *supra* note 145, at 333-56, 369-70. President Nixon's appointment of Miles Kirkpatrick, the head of the ABA Committee, to chair the FTC in 1970 is an outstanding example of this trend.

In addition to the appointments process, the Executive Branch can seek to influence the Commission's activities through the Office of Management and Budget (OMB). On at least two occasions, OMB has attempted to alter the FTC's enforcement functions through the President's annual budget request to Congress. In 1937, the Bureau of the Budget, OMB's predecessor, tried unsuccessfully to eliminate the Commission's Economic Division by refusing to seek appropriations for its operation. *See Independent Offices Appropriation Bill for 1937: Hearing Before the Subcomm. of the House Comm. on Appropriations*, 74th Cong., 2d Sess. 218-60 (1936). More recently, in 1981, OMB asked that Congress gradually cease funding the FTC's Bureau of Competition. *See* note 1 *supra*.

[215] The FTC's success would require legislative support for both antitrust generally and for the agency's specific antitrust programs. As political scientist David Mayhew observes, the purposes which inspire congressmen to create regulatory bodies may differ from those which motivate legislators' reactions to specific enforcement programs.

> Position-taking politics may produce statutes that are long on goals but short on means to achieve them. . . . Probably the best examples of congressional symbolism are those arising out of efforts to regulate business. Regulatory statutes are the by-products of congressional position taking at times of public dissatisfaction. . . . What happens in enforcement is largely a result of congressional credit-claiming activities on behalf of the regulated; there is every reason to believe that the regulatory agencies do what Congress

sponse of Congress and the Commission to the 1969 ABA Report is the subject of the next section.

III. THE FEDERAL TRADE COMMISSION'S COMPETITION PROGRAMS: 1969-1980

From the date of its release, the ABA Report became a congressionally accepted standard for measuring the Commission's antitrust performance.[216] Oversight and appropriations committees believed that the study had diagnosed the agency's ills correctly and had presented a sensible blueprint for reform.[217] Congress endorsed the Report's conclusion that the FTC had used its antitrust powers timidly and unimaginatively, and insisted that future programs deal forth-

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> wants them to do. The ambitious "public interest" aims of the statutes are seldom accomplished.

D. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 134-35 (1974) (footnotes omitted).

[216] *See, e.g., Federal Trade Commission Oversight: Hearings Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. 5 (1976) (remarks of Rep. Van Deerlin) [hereinafter cited as *House 1976 FTC Oversight Hearings*]; *Federal Trade Commission Oversight: Hearings Before the Senate Comm. on Commerce*, 93d Cong., 2d Sess. 352 (1974) (remarks of Sen. Cook) [hereinafter cited as *Senate Commerce Committee 1974 Oversight Hearings*]; *Agriculture—Environmental and Consumer Protection Appropriations for 1973: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 92d Cong., 2d Sess. 511 (1972) (remarks of Rep. Evans) [hereinafter cited as *House 1973 Appropriations Hearings*]; *Agriculture—Environmental and Consumer Protection Appropriations for 1973: Hearings Before a Subcomm. of the Senate Comm. on Appropriations*, 92d Cong., 2d Sess. 1483 (1972) (remarks of Sen. McGee) [hereinafter cited as *Senate 1973 Appropriations Hearings*]; *Agriculture—Environmental and Consumer Protection Appropriations for 1972: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 92d Cong., 1st Sess. 65-66 (1971) (remarks of Rep. Whitten) [hereinafter cited as *House 1972 Appropriations Hearings*]; *Independent Offices and Department of Housing and Urban Development Appropriations for Fiscal Year 1971: Hearings Before a Subcomm. of the Senate Comm. on Appropriations*, 91st Cong., 2d Sess. 487 (1970) (remarks of Sen. Pastore) [hereinafter cited as *Senate 1971 Appropriations Hearings*]; *Independent Offices and Department of Housing and Urban Development Appropriations for 1971: Hearings Before the Subcomm. on Independent Offices and Department of Housing and Urban Development of the House Comm. on Appropriations*, 91st Cong., 2d Sess., Pt. 1, 1281 (1970) (remarks of Rep. Evins) [hereinafter cited as *House 1971 Appropriations Hearings*]; *Independent Offices and Department of Housing and Urban Development Appropriations for 1970: Hearings Before the Subcomm. on Independent Offices and Department of Housing and Urban Development of the House Comm. on Appropriations*, 91st Cong., 1st Sess., Pt. 1 (1969) [hereinafter cited as *House 1970 Appropriations Hearings*]; *Nomination of Miles W. Kirkpatrick to be Chairman of the Federal Trade Commission: Hearings Before the Senate Comm. on Commerce*, 91st Cong., 2d Sess., 174-79 (1970) (remarks of Sens. Cook and Hart) [hereinafter cited as *Kirkpatrick Confirmation Hearings*]; *Nomination of Caspar W. Weinberger to be Chairman of the Federal Trade Commission: Hearings Before the Senate Comm. on Commerce*, 91st Cong., 1st Sess. 5, 12-15 (1970) (remarks of Sens. Magnuson and Moss) [hereinafter cited as *Weinberger Confirmation Hearings*]; *Federal Trade Commission Procedures: Hearings Before the Subcomm. on Administrative Practice and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess., Pt. 1, 99-110 (1969) (remarks of Sen. Kennedy) [hereinafter cited as *1969 Admin. Practice & Procedure Hearings*].

[217] The one major ABA proposal that Congress did not approve was the suggestion that the FTC limit its Robinson-Patman Act enforcement work. *See infra* text accompanying notes 235-37.

rightly with difficult, economically important antitrust problems. Congress also perceived a longstanding indifference by the FTC to the weaknesses emphasized in the ABA Report. Congressional leaders underscored their demands for improvement by reiterating the ABA's view that reform should be a basic condition for the agency's future existence.[218] Though perhaps overstated, such admonitions left little doubt that Congress would no longer tolerate what it perceived to be plodding, insignificant antitrust enforcement.

This section analyzes in two parts the development of the FTC's competition programs since the ABA Report. The first covers the period from 1969 through the second session of the 94th Congress in 1976. The second section covers the period from 1977 through 1980. Each section discusses the general antitrust role Congress wanted the agency to perform, as well as the specific ways in which it preferred the FTC to use its competition resources, and reviews the Commission's response to this guidance.

A. *1969-1976*

1. Congressional Guidance

The oversight and appropriations committees frequently articulated the general tone and character of antitrust enforcement they expected from the FTC's leadership.[219] They called for a fundamental redirection of the agency's competition programs. Indeed, the hearings of this period abound with instructions that the Commission's antitrust programs place a premium on boldness, experimentation, and a willingness to tackle major sources of consumer injury.

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[218] Senator Edward Kennedy, then Chairman of the Senate Judiciary Subcommittee on Administrative Practice and Procedures, made this clear during an FTC oversight hearing on the day the ABA Report appeared.

> The subcommittee hopes . . . to see to it that the proposals we have received do not merely become grist for the mill of future students of the FTC . . . . Surely, 45 years after Henderson's landmark work on the FTC, first exposing many of the same problems we see today, the time has come either to do something about them, or, . . . to consider abolishing the agency and starting it from the ground again.

1969 Administrative Practice & Procedure Hearings, supra note 216, at 110.

Two major recent studies of the FTC's relations with Congress in the 1960's and 1970's have demonstrated the existence of a strong congressional sentiment favoring vigorous government antitrust and consumer protection initiatives dating back at least to the mid-1960's. *See* Pertschuk, *supra* note 9; Weingast & Moran, *supra* note 9. The chief functions of the ABA Report and 1969 Nader Report appear to have been those of (1) sharply increasing public and congressional attention to the agency and its performance, and (2) catalyzing powerful, pre-existing congressional reform impulses by supplying a concrete program for renewing the institution.

[219] As mentioned above, several scholars have concluded that, since the founding of the FTC, the Senate has cursorily reviewed most appointments to the Commission. *See* J. Graham & V. Kramer, *supra* note 145, at 400; R. Katzmann, *supra* note 63, at 140-42; *see also supra* note 183. This view accurately describes the level of Senate participation in the appointments process for much of the FTC's history, but not for the early and middle 1970's. The Senate Commerce Committee and its staff actively screened potential commissioner nominees before their appointments and used confirmation hearings to elicit pledges that the nominees would aggressively execute the agency's responsibilities. *See* J. Graham & V. Kramer, *supra* note 145, at 333-51, 370-

The process of redirection began in earnest in November 1969 during hearings to confirm Caspar Weinberger as the agency's new Chairman. Senator Warren Magnuson, Chairman of the Senate Commerce Committee, told the nominee to exert strong, independent leadership in renewing the agency:

> This Commission is very important to this committee. I am sure that you realize the task that confronts the new Chairman in light of so many recent criticisms of the operation of the Federal Trade Commission . . . .
>
> . . . I am hopeful that you will help maintain the right kind of morale by recruiting strongly and expanding the existing Trade Commission programs in order to perform the job well. . . .
>
> The Trade Commission is an arm of Congress, and we have entrusted to that agency numerous tasks that require a great deal of attention and a great deal of fortitude not to respond to any pressures that come from any place.[220]

Miles Kirkpatrick, Weinberger's successor, received similar encouragement upon his first appearance before the Senate Appropriations Committee in 1971. Subcommittee Chairman Gale McGee told Kirkpatrick that his Committee wanted the Commission to act aggressively and take risks in applying its competition powers:

> For a long time many of us have felt . . . that the FTC over a long period of time . . . seemed to be either sitting on its position rather than moving with the changing times or in many

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71; Weingast & Moran, *supra* note 9, at 6; *see also infra* text accompanying notes 220-25. The driving forces on the Commerce Committee were Senator Warren Magnuson, the Committee Chairman, and Senators Frank Moss and Philip Hart, who were Chairman and Vice-Chairman, respectively, of the Subcomm. for Consumers. All shared an abiding interest in the FTC's revitalization and used the Committee's power to promote that goal. *See* Pertschuk, *supra* note 9; Weingast & Moran, *supra* note 9, at 18-19. The Commerce Committee Staff (whose chief counsel was Michael Pertschuk) and other staffs at the disposal of these senators were instrumental in seeing that nominees were suitable to the Committee leadership. *See* J. GRAHAM & V. KRAMER, *supra* note 145, at 350-51. The joint efforts of the senators and their staffs ensured the selection of appointees—particularly nominees for the chairmanship—who shared the committee's enforcement goals and the abandonment of potential nominees who did not. *See* R. KATZMANN, *supra* note 63, at 143-45.

[220] *Weinberger Confirmation Hearings*, *supra* note 216, at 5. The appropriations committees of the House and Senate conveyed the same message to Weinberger in his first appearances before them. *See, e.g., House 1971 Appropriations Hearings*, *supra* note 216, at 1289-90.

> instances actually retreating from what its original intent had been. . . .
>
> I think you would find a much friendlier Congress up here than some of your [budget] requests might suggest . . . that a great part of the Commission's duty is to strike blows in behalf of the consumer . . . .
>
> I think this is one of the Federal commissions that has a much larger responsibility and capability than sometimes it has been willing to live up to for reasons of congressional sniping at it in some respects or pressures put on it through the industry and the like.
>
> Too often it has been either shy or bashful . . . . That is why we were having a rather closer look at your requests just in the hopes of encouraging you, if anything, to make mistakes, but I think the mistakes you are to make ought to be mistakes in doing and trying rather than playing safe in not doing.
>
> I believe that is the most serious mistake of all . . . you are not faulted for making mistakes. You may be for making it twice in a row, for not learning properly but, we would rather you make a mistake innovating, trying something new, rather than playing so cautiously that you never make a mistake . . . .[221]

Similarly, when Lewis Engman appeared before the Senate Commerce Committee as Chairman-designate in 1973, the Committee's members exhorted him to follow the path traveled by Weinberger and Kirkpatrick during the preceding three years.[222] During the same hearings, Senator Cotton complained that the FTC "has had a need for some kind of injection to pep it up so it would fulfill its mission."[223] Senator Ted Stevens told Engman that he expected bold action from the new Chairman: "I am really hopeful . . . that you will become a real zealot in terms of consumer affairs and some of these big business people will complain to us that you are going too far. That would be the day, as far as I am concerned."[224] On these and other occasions, the oversight committees left the Commission's leaders with little doubt about the basic direction the Commission should pursue.[225]

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[221] *Agriculture—Environmental and Consumer Protection Appropriations for Fiscal Year 1972: Hearings Before a Subcomm. of the Senate Comm. on Appropriations*, 92d Cong., 1st Sess. 2673 (1971) [hereinafter cited as *Senate 1972 Appropriations Hearings*]. Senator McGee concluded the hearings by stating, "[w]e have considerable dependence on your initiative . . . to stay on top of the great bulk of these bothersome areas that are easily forfeited through neglect and we would like to encourage you to jump at rather than from." *Id.* at 2699. The following year, Senator McGee noted with approval that Chairman Kirkpatrick had "responded to the criticism . . . by both Mr. Nader and the American Bar Association by moving aggressively against some of the major industries in the United States." *Senate 1973 Appropriations Hearings*, *supra* note 216, at 1483. As he had the year before, the Subcommittee Chairman urged Kirkpatrick to apply the agency's antitrust powers vigorously. *Id.* at 1490, 1507.

[222] *Nomination of Lewis A. Engman to be a Commissioner, Federal Trade Commission: Hearings Before the Senate Comm. on Commerce*, 93d Cong., 1st Sess. 4-5 (1973) [hereinafter cited as *Engman Confirmation Hearings*]. *See also Agriculture-Environmental and Consumer Protection Appropriations for 1974: Hearings Before the Subcomm. on Agriculture—Environmental and Consumer Protection of the House Comm. on Appropriations*, 93d Cong., 1st Sess., Pt. 6, 74 (1973) [hereinafter cited as *House 1974 Appropriations Hearings*] ("I personally feel that [Kirkpatrick] did a real fine job, and we hate to see him go . . . . [Y]ou do follow in the footsteps of someone we had a high regard for, and I think the country did.") (comments of Rep. Whitten to Chairman Engman).

The confirmation and oversight process revealed the qualities Congress wanted to see in the Commission's antitrust work. Beyond fixing the broad objectives and tone they wanted to achieve, the committees actively suggested specific uses for the Commission's competition resources. As a first step, Congress urged the FTC to establish an effective system for planning its affairs and choosing priorities.[226] Various committees emphasized the need for a planning mechanism that filtered out "trivial" matters and focused the FTC's resources on major antitrust problems.[227] In the committees' view, the Commission also should translate the fruits of its improved planning efforts into guidelines by which staff attorneys and economists would organize their work.[228]

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[223] *Engman Confirmation Hearings*, *supra* note 222, at 25.

[224] *Id.* at 31.

[225] The committees routinely emphasized the importance of taking congressional views seriously. *See, e.g.*, *Weinberger Confirmation Hearings*, *supra* note 216, at 31 (comments of Sen. Hartke to Chairman-designate Weinberger); *Federal Trade Commission Practices and Procedures: Hearings Before the Special Subcomm. on Investigations of the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 2d Sess. 40 (1974) (comments of Rep. Devine to Chairman Engman) [hereinafter cited as *House Special Investigations Subcomm. 1974 Hearings*].

[226] *See, e.g.*, *Senate Commerce Committee 1974 Oversight Hearings*, *supra* note 216, at 352 (remarks of Sen. Cook); *House 1972 Appropriations Hearings*, *supra* note 216, at 185, 211-12 (remarks of Reps. Whitten and Evans); 1969 *Admin. Practice & Procedure Hearings*, *supra* note 216, at 8-14, 22-23, 25-26, 40-42 65-67, 101-02 (remarks of Sen. Kennedy on priorities of the Commission).

The committees were disturbed by the ABA's conclusion that the agency relied almost entirely on such passive devices as the "mailbag" to select enforcement targets. *See, e.g.*, *House 1972 Appropriations Hearings*, *supra* note 216, at 94 (remarks of Rep. Whitten); *Weinberger Confirmation Hearings*, *supra* note 216, at 24 (remarks of Sen. Moss).

[227] *See, e.g.*, *House 1970 Appropriations Hearings*, *supra* note 216, at 390 (Rep. Evins expressed to Chairman Dixon his concern over the FTC's exhausting resources on trivial matters).

As a guide to selecting projects, the new planning efforts should seek to measure the costs and benefits of contemplated and completed cases. *See, e.g.*, *Agriculture—Environmental and Consumer Protection Appropriations for 1975: Hearings Before the Subcomm. on Agriculture—Environmental and Consumer Protection of the House Comm. on Appropriations*, 93d Cong., 2d Sess., Pt. 6, at 694 (1974) (remarks of Rep. Whitten) [hereinafter cited as *House 1975 Appropriations Hearings*; *Senate Commerce Committee 1974 Oversight Hearings*, *supra* note 216, at 372-73 (remarks of Sen. Moss).

In addition to promoting the creation of a strong institutional planning base, Congress singled out many specific, generic competition problems and industry sectors for the FTC to scrutinize. They requested that the agency use a substantial portion of its antitrust resources to examine the consequences of industrial concentration and the influence of market structure upon economic performance—problems which Congress regarded as among the country's most urgent competition priorities.[229]

Congress was especially concerned about business mergers, particularly conglomerate acquisitions contributing to industrial concentration.[230] Congressional interest in this phenomenon took two forms. First, it encouraged the Commission to refine its techniques for measuring the performance of diversified firms and their constituent parts.[231] For example, in 1973, Congress removed several obstacles to the implementation of a line-of-business reporting program through measures approved as part of the Trans-Alaska Pipeline Authorization Act.[232] Second, Congress enacted new legislation to increase the FTC's ability to identify and halt anticompetitive mergers. The 1973 Pipeline Authorization Act gave the FTC power in certain circumstances, to seek temporary restraining orders and preliminary injunctions in federal court to stop existing or impending antitrust violations, notably, illegal mergers.[233] In 1976 Congress amended the Clayton Act to require firms to notify the FTC and the Justice Department before making certain acquisitions.[234]

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[228] *House 1976 FTC Oversight Hearings*, *supra* note 216, at 7 (remarks of Rep. Van Deerlin); *Senate 1972 Appropriations Hearings*, *supra* note 221, at 2683 (remarks of Sen. McGee).

[229] *See, e.g.*, *S. 2387 and Related Bills: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess., Pt. 1, at 47-48 (1975) (Sen. Packwood stated: "When we in Congress see this inevitable result of the concentration of power, . . . the stifling of competition . . ., the answer is not to throw out the competitive system . . . [but] to restore the competitive system. The answer is to require the breaking up and divestiture of the giant business conglomerates into smaller parts so that the competitive system may flourish and grow again."); *Senate 1972 Appropriations Hearings*, *supra* note 221, at 2678-79 (Sen. McGee's questions to Chairman Kirkpatrick); Letter from Sen. William Proximire to Chairman Weinberger (June 1, 1970), *reprinted in Kirkpatrick Confirmation Hearings*, *supra* note 216, at 136-38; *Role of Giant Corporations: Hearings on the Automobile Industry—1969 Before the Subcomm. on Monopoly of the Senate Select Comm. on Small Business*, 91st Cong. 1st Sess., Pt. 1, 1-3 (1969) (remarks of Chairman Nelson) [hereinafter cited as *Sen. 1969 Automobile Hearings*].

[230] *See, e.g.*, *Weinberger Confirmation Hearings*, *supra* note 216, at 25-26 (question addressed by Sen. Moss to Chairman-designate Weinberger).

The Executive Branch also expressed concern over existing merger trends. Address by Attorney General John Mitchell, Georgia Bar Association (June 6, 1969), *reprinted in Economic Concentration Reports: Pt. 8*, *supra* note 61, at 5122-23 ("I believe that the future vitality of our free economy may be in danger because of the increasing threat of economic concentration by corporate mergers. . . . The danger that . . . super-concentration poses to our economic, political and social structure cannot be overestimated.").

[231] In November 1969, Sen. Moss asked Chairman-designate Weinberger whether Weinberger favored divisional or line-of-business reporting for the top 400 companies. In reply Weinberger stated, "I know the Federal Trade Commission has very broad reporting authority to require and discover the financial facts concerning corporations, and I think that this should be used in the pursuance of authorized studies with respect to determining conglomerate policy. . . ." *Weinberger Confirmation Hearings*, *supra* note 216, at 26; *see also House 1973 Appropriations Hearings*, *supra* note 216, at 522.

[232] Trans-Alaska Pipeline Authorization Act, § 409, 44 U.S.C. §§ 3502, 3512 (1976). The

A second generic competition problem in which Congress took an active interest was Robinson-Patman Act enforcement.[235] Several committees called on the Commission to explain a perceived agency neglect of the statute.[236] The discussions of Robinson-Patman enforcement demonstrated that, while Congress agreed with the ABA's proposal that the FTC expand its antitrust efforts in other areas, it wanted the agency to maintain other programs traditionally supported by Congress.[237]

As it described the generic competition problems the Commission

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amendments authorized the Commission to issue certain questionnaires without first obtaining clearance from the Office of Management and Budget (OMB), as previously required. *Id.* §§ 3501-3511 (1970). In 1972 and 1973 the Commission had sought OMB approval for its line-of-business questionnaires but was turned down each time. The 1973 legislation transferred this authority to the General Accounting Office, a body more favorably disposed to the FTC proposal. *Id.* § 3512; *see Senate Commerce Committee 1974 Oversight Hearings*, *supra* note 216, at 133; *House 1973 Appropriations Hearings*, *supra* note 216, at 522.

[233] Trans-Alaska Pipeline Authorization Act, § 408, 15 U.S.C. § 53 (1976). This authority would prove to be an important tool in the agency's merger program. *See, infra* note 408.

[234] 15 U.S.C. § 18a(b) (1976). The statute also established a mandatory waiting period for firms attempting certain acquisitions and tender offers.

[235] Robinson-Patman Price Discrimination Act §§ 2-4, 15 U.S.C. §§ 13-13b, 21a (1976). During Weinberger's confirmation hearings in 1969, for example, the Senate Commerce Committee questioned the nominee about his enforcement plans. *Weinberger Confirmation Hearings*, *supra* note 216, at 28. Shortly before the hearings, Representative John Dingell, Chairman of the House Subcommittee on Small Business and the Robinson-Patman Act, had written to the Senate Commerce Committee asking that it discourage the Commission from following the ABA Report's suggested reconsideration of the agency's existing Robinson-Patman policies. *Id.* at 27.

[236] *House Special Investigations Subcomm. 1974 Hearings*, *supra* note 225, at 208. In 1974, Representative Staggers, Chairman of the House Interstate and Foreign Commerce Committee, provided this assessment of the FTC's Robinson-Patman enforcement trend:

> In 1960, the Commission issued 130 Robinson-Patman complaints and 45 orders. In 1963, it issued 219 complaints and 250 orders. In 1965, it issued 13 complaints and 21 orders. In 1969, it issued 8 complaints and 9 orders. . . . In 1973, it issued 3 complaints and 4 orders. To me this dramatic decrease in the number of Robinson-Patman Act cases between 1960 and 1973 raises questions about whether the Commission is enforcing the law. The subcommittee must be concerned about whether the decrease in Robinson-Patman Act enforcement by the FTC constitutes an administrative abolition of the law.

Id. at 68.

[237] *See Recent Efforts to Amend or Repeal the Robinson-Patman Act—Part 1: Hearings Before the Ad Hoc Subcomm. on Antitrust, the Robinson-Patman Act, and Related Matters of the House Comm. on Small Business*, 94th Cong., 1st Sess. (1975).

should address, Congress also earmarked specific industries and economic sectors it believed were fruitful subjects for antitrust inquiry. In the early 1970's, Congress generally regarded the food industry as the top priority for FTC competition analysis.[238] Several committees asked the agency to examine the effect of the food industry's structure on prices,[239] with special emphasis upon concentration in manufacturing[240] and retailing.[241]

With the sudden tightening of fuel supplies in the early 1970's, however, energy soon displaced the food industry as Congress' preferred FTC antitrust priority. By 1972, the Commission had received a growing number of congressional requests to begin or expand studies of various aspects of the energy industry, including gasoline marketing, natural gas supplies, the substitutability of oil, coal, natural gas, and uranium as electric utility fuels, mergers in the petroleum industry, and the effect of petroleum industry structure upon petroleum product prices.[242] In 1973, gasoline and fuel oil shortages became especially acute, and virtually every major congressional committee with responsibility for competition or energy policy directed the Commission to make energy its chief antitrust priority.[243]

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[238] *See, e.g., Senate Commerce Committee 1974 Oversight Hearings, supra* note 216, at 2, 109 (remarks of Sen. Moss); *Food Price Investigation: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 35, 75-76 (1973). Committee Chairman Rodino stated:

> I think the Federal Trade Commission has tremendous areas of responsibility at a time when prices are rising at such a rate, and the consumer is concerned whether or not the government is living up to its responsibility. . . . [A]ntitrust enforcement in the food industry has lacked vigilance . . . . Consumers are not being well served by the food industry.

Id.; *see also id.* at 1-2, 35-48 (remarks of Reps. Rodino and McClory). H.R. REP. No. 1175, 92d Cong., 2d Sess. 96 (1972) (suggesting that the FTC "give increased attention to the problem(s) of increased food costs").

[239] *Senate 1973 Appropriations Hearings, supra* note 216, at 1494-95 (remarks of Sen. McGee); *Senate 1972 Appropriations Hearings, supra* note 221, at 2684-86 (remarks of Sen. McGee).

[240] *Senate Commerce Committee 1974 Oversight Hearings, supra* note 216, at 111; *Senate 1972 Appropriations Hearings, supra* note 221, at 2685-86.

[241] *See, e.g., Senate 1972 Appropriations Hearings, supra* note 221, at 2685-86; *House 1975 Appropriations Hearings, supra* note 227, at 745.

[242] *Marketing Practices in the Gasoline Industry: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess., Pt. 1, at 183-84 (1970) (letter from Sen. Hart to A. Everette MacIntyre, Acting Chairman, Federal Trade Commission (Aug. 14, 1970)); *The Natural Gas Industry: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess., Pt. 1, 197-208 (1973) [hereinafter cited as *Natural Gas Industry 1973 Hearings*]; These requests built upon the FTC's extensive petroleum industry expertise, which dated back to the work of the Bureau of Corporations at the turn of the century. *See* PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE SENATE COMM. ON GOVERNMENT OPERATIONS, 93D CONG., 1ST SESS., INVESTIGATION OF THE PETROLEUM INDUSTRY, 3-4 (Comm. Print 1973) [hereinafter cited as FTC PETROLEUM INDUSTRY INVESTIGATION].

[243] *See, e.g., Competition in the Energy Industry: Gasoline and Fuel Oil: Hearings Before the*

In their discussions about fuel shortages, several committees displayed an urgent interest in having the FTC move promptly to address perceived competitive dangers in the energy industry. During hearings on the FTC's budget in April of 1973, Representative Mark Andrews conveyed this message to Chariman Engman in comments that reflected the tone and substance of congressional guidance to the agency in this period:

> In the last 6 months in this country we have come smack up against an energy crisis. We have specific knowledge that small independent refineries in mid-America are unable to get crude oil because the majors are cutting them off . . . .
>
> Here right under your nose is something where obviously you haven't been doing your job or you would have it resolved . . . . I might ask the question where were you then and what are you doing now to force the majors, out of a sense of Christian justice if not economic survival for mid-America, to allow these small independent refineries to get a supply of crude so they can serve their customers . . . .
>
> As far as I can see, the Federal Trade Commission has been sitting fat, dumb, and happy doing nothing about it.[244]

Within months, various other committees of Congress called for the Commission to investigate the shortages and move promptly to protect independent refiners and marketers from a loss of petroleum supplies.[245] Committee members closely questioned Commission officials about features of major oil company structure and behavior that might warrant formal FTC intervention.[246] Still other committees, without specifically requesting FTC action, expressed serious concern with the

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Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 1-3, 235 (1973) (remarks of Subcomm. Chairman Hart and Sen. Kennedy) [hereinafter cited as *Senate Antitrust Subcomm. 1973 Hearings on Gasoline and Fuel Oil*]; FTC PETROLEUM INDUSTRY INVESTIGATION, *supra* note 242, at v-vii (letter of May 31, 1973 from Sen. Jackson, Chairman of the Senate Government Operations Permanent Subcomm. on Investigations, to Lewis Engman); *House 1974 Appropriations Hearings*, *supra* note 222, at 101, 103, 145 (remarks of Reps. Andrews and Evans); *Fair Marketing of Petroleum Products Act: Hearings on S.1599, S.1694, and S.723 Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 93d Cong., 1st Sess. 111-12 (1973) (remarks of Sen. Stevenson) [hereinafter cited as *Senate Hearings on 1973 Fair Marketing Acts*]; *see also Concentration by Competing Raw Fuel Industries in the Energy Market and Its Impact on Small Business: Hearings Before the Subcomm. on Special Small Business Problems of the House Select Comm. on Small Business*, 92d Cong., 1st Sess. 1-33 (1971) (remarks of Subcomm. Chairman Smith and Rep. Conte).

[244] *House 1974 Appropriations Hearings*, *supra* note 222, at 101. *See also id.* at 103.

[245] *See, e.g.*, *Senate Hearings on 1973 Fair Marketing Acts*, *supra* note 243, at 111-12; *Senate Antitrust Subcomm. 1973 Hearings on Gasoline and Fuel Oil*, *supra* note 243 at 1.

[246] *See, e.g.*, FTC PETROLEUM INDUSTRY INVESTIGATION, *supra* note 242, at v, vii (letter of May 31, 1973 from Sen. Jackson to Chairman Engman: "I am hereby requesting the Federal Trade Commission to prepare a report within thirty days regarding the relationship between the

viability of the petroleum industry's independent sector.[247]

In July 1973, the Commission issued a complaint charging the country's eight largest petroleum companies with maintaining a noncompetitive market structure in the Atlantic and Gulf Coast states.[248] The filing of this complaint, however, did not diminish congressional interest in having the Commission continue to monitor and address industry developments.[249] Through legislation, Congress substantially expanded the Commission's competition advocacy responsibilities in the energy area. These included requirements that the FTC analyze the effects of the mandatory petroleum allocation program pursuant to the Emergency Petroleum Allocation Act of 1973;[250] comment on the activities of American petroleum companies participating in programs under the aegis of the International Energy Agency;[251] and review deepwater port applications filed with the Department of Transportation under the Deepwater Ports Act of 1974.[252]

Although food and energy were Congress' most important competition priorities in the early 1970's, they were not the only industries arousing antitrust interest. Various committees earmarked several

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structure of the petroleum industry and related industries and the current prospective shortages of petroleum products."); *Senate Hearings on 1973 Fair Marketing Acts*, *supra* note 243, at 234-35.

[247] *See, e.g.*, *Mandatory Fuels Allocation: Hearings Before the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 1st Sess. 1, 21-22 (1973) (remarks of Comm. Chairman Staggers and Rep. MacDonald).

[248] In re Exxon Corp., [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,388 at 20,269 (Dkt. No. 8934, July 17, 1973). One respondent to the *Exxon* suit later sought unsuccessfully to have the complaint dismissed on the ground that the Commission had no "reason to believe" that the FTC Act had been violated, and had issued the complaint mainly in response to congressional pressure. *See* FTC v. Standard Oil Co. of California, 449 U.S. 232 (1980).

[249] The committees and individual members expressed strong interest in FTC and other government actions that might protect the competitive vigor of independent refiners and marketers. *See, e.g.*, *House 1975 Appropriations Hearings*, *supra* note 227, at 751-53, 758-59, 803-04 (remarks of Reps. Andrews and Robinson); *The Consumer Energy Act of 1974: Hearings Before the Senate Comm. on Commerce*, 93d Cong., 1st & 2d Sess., Pt. 3, at 999, 1009 (1973-1974) (remarks of Sen. Mondale) [hereinafter cited as *Consumer Energy Act: Pt. 3*]; *Oil Price Decontrol: Hearings Before the Senate Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. 1-2, 6-7, 36, 181 (1975) (remarks of Sens. Jackson, Haskell, Kennedy, and Bumpers); *Crude Oil Cost and Supply Policy: Effect on Independents: Hearings Before the Subcomm. on Budgeting, Management, and Expenditures of the Senate Comm. on Government Operations*, 93rd Cong., 2d Sess. 3, 6-7, 33-34, 52 (1974) (remarks of Sens. Muskie, Huddleston, Brock and Rep. Melcher); *The Industrial Reorganization Act: Hearings on S.1167 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93rd Cong., 2d Sess., Pt. 8, at 6318-27 (1974) (remarks of Sen. Nelson and Reps. Apsin, Brown, William Ford, Helstoski, and Roybal); 121 CONG. REC. 32,007-10 (1975) (remarks of Sen. Gary Hart).

[250] § 7, 15 U.S.C. § 756 (1976); *see House 1975 Appropriations Hearings*, *supra* note 249, at 647, 697. A major congressional purpose in ordering the FTC study was to measure the allocation system's effects on independent refiners and marketers. *Id.* at 697 (remarks of Rep. Whitten).

[251] 42 U.S.C. § 6272(e) (1976); 50 U.S.C. § 2158 (1976).

[252] 33 U.S.C. §§ 1501-1524 (1976).

other areas as particularly deserving of FTC competition analysis; most frequently mentioned were steel,[253] automobiles,[254] and medical care.[255]

As the materials above suggest, Congress in the early and mid-1970's often indicated that, while reports and studies were a useful part of the FTC's work, the Commission should rely more heavily on compulsory enforcement procedures such as litigation.[256] Congress was also concerned that it had paid insufficient attention to ensuring compliance with existing orders.[257] Consequently, the committees encouraged the Commission to bolster its compliance efforts,[258] and in 1973, Congress doubled the maximum civil penalty for each violation of a Commission order to $10,000.[259] Moreover, to increase flexibility in prosecution, Congress gave the FTC power to bring civil penalty actions in federal court where the Justice Department declined to do so.[260]

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[253] *See, e.g., Market Power, The Federal Trade Commission, and Inflation: Hearing Before the Joint Economic Comm. of Congress*, 93d Cong., 2d Sess. 58 (1974) [hereinafter cited as *Joint Economic Comm. 1974 Hearings*]; *Senate 1972 Appropriations Hearings, supra* note 221, at 2686.

[254] *See, e.g., Automotive Repair Industry: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess., Pt. 4, at 1693-1722 (1970); *Senate 1972 Appropriations Hearings, supra* note 221, at 2688; *House 1973 Appropriations Hearings, supra* note 216, at 499; *Consumer Energy Act of 1974: Hearings Before the Senate Comm. on Commerce*, 93d Cong. 1st Sess., Pt. 1, at 108 (1973) (Sen. Long to J. Halverson, Director of the FTC's Bureau of Competition: "I would think you would have done yourself a study on competition for the FTC on the automobile industry because that is a good example of concentration. I think I have an idea how they price those automobiles, do you?").

[255] *See, e.g.,* H.R. REP. No. 1175, 92d Cong., 2d Sess. 96 (1972) (recommendation by House Appropriations Comm. that FTC give greater attention to the problem of "increased medical costs"); *House 1974 Appropriations Hearings, supra* note 247, at 109-110, 119 (remarks of Rep. Whitten).

[256] This Congressional attitude was evident in the following dialogue between FTC Chairman Dixon and Rep. Evins, Chairman of the House Appropriations Subcommittee on Independent Offices and Department of Housing and Urban Development:

> MR. EVINS. . . . Mr. Chairman, you pointed out in your statement you have two basic methods of approach at the Commission. One is voluntary compliance, which is the soft touch approach, and the other is a crackdown and legal enforcement.
>
> MR. DIXON. That is right.
>
> MR. EVINS. I recognize you have to have a balance between the two. You cannot prosecute every case that comes before the Commission. I think if you had a little more emphasis on legal enforcement it would be better. You have been building up consent agreements, stipulation letters, and settlements on a voluntary basis. This gets the job done for the one industry but it does not set an example to others.
>
> I think you should put more emphasis on your legal enforcement and crackdown in some of your major cases.

House 1970 Appropriations Hearings, supra note 216, at 363-64; *see also House 1971 Appropriations Hearings, supra* note 216, at 1381-82 (remarks of Rep. Evins); *Senate 1972 Appropriations Hearings, supra* note 221, at 2684 (remarks of Sen. McGee).

[257] *See Weinberger Confirmation Hearings, supra* note 216, at 16 (remarks of Sen. Moss).

[258] *See House 1974 Appropriations Hearings, supra* note 222, at 171; *House 1973 Appropriations Hearings, supra* note 216, at 425.

[259] Trans-Alaska Pipeline Authorization Act of 1973, § 408, 15 U.S.C. § 45(e) (1976); Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, § 205, 15 U.S.C. § 45(m)(1)(A) (1976). The Magnuson-Moss bill also expanded the Commission's jurisdiction under section 5 to matters "in *or affecting* commerce". *Id.* § 201, 15 U.S.C. §§ 45, 52(b) (1976); included "persons and partnerships" as entities subject to the agency's investigation powers under

Congress' exhortations about the appropriate style and content of FTC antitrust programs had little chance alone of stimulating a major FTC revitalization. An especially telling test of congressional commitment was appropriations.[261] When asked in 1969 by Senator Mathias what FTC renewal would require, Chairman Dixon responded, "[S]ee to it that the agency has the money and the manpower."[262] In the 1970's, Congress took this advice; the agency's total budget rose from $20.9 million in fiscal year 1970 to over $70 million in fiscal year 1980.[263]

The question then arose of how to measure the FTC's effectiveness in using the increased funds. Two different and, in some respects, conflicting, standards emerged from the oversight hearings. On one hand,

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sections 6 and 9. *Id.* § 203, 15 U.S.C. §§ 46, 49 (1976); and gave the FTC authority to seek Supreme Court review of its rulings where the Solicitor General declined to do so. *Id.* § 204, 15 U.S.C. § 49 (1976).

[260] *Id.* § 204, 15 U.S.C. § 49 (1976).

[261] Throughout its history, the Commission had received only modest financial support. Beginning with $200,000 in 1915, the FTC's budget grew by miniscule increments through the 1960's. Its *total* outlays reached nearly $2 million in 1935, $3.5 million in 1949, $4.3 million in 1952, $5.5 million in 1957, $10.3 million in 1962, and just short of $17 million in 1969, the year of the ABA REPORT. Through fiscal year 1969, Congress had appropriated approximately $230 million for the FTC, roughly $100 million of which had gone to support antitrust enforcement. *See* FEDERAL ANTITRUST ACTIVITIES, *supra* note 107, at 2; *Regulatory Agency Budgets: Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations*, 92d Cong., 2d Sess., Pt. 2, at 457-63 (1972) [hereinafter cited as *Regulatory Agency Budgets*]. This slow rate of growth took place at a time when Congress was adding substantially to the agency's antitrust and consumer protection responsibilities. These include the Robinson-Patman Act, §§ 2-4, 15 U.S.C. §§ 13-13b, 21a (1976); Wool Products Labeling Act, §§ 2-11, 14, 15 U.S.C. §§ 68-68j (1976); Lanham Trademark Act, § 1-45, 15 U.S.C. §§ 1051-1127 (1976); Textile Fiber Products Identification Act, § 2-12, 14, 15 U.S.C. §§ 70-70k (1976), Federal Cigarette Labeling and Advertising Act, §§ 2-10, 15 U.S.C. §§ 1331-1339 (1976), and Fair Packaging and Labeling Act, §§ 2-12, 15 U.S.C. §§ 1451-1461 (1976).

[262] *1969 Admin. Practice & Procedure Hearings*, *supra* note 216, at 24. The oversight and appropriations committees agreed that the agency's unsatisfactory performance in the past stemmed in major respects from inadequate funding. *See, e.g.*, *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations For Fiscal Year 1976: Hearings Before a Subcomm. of the Senate Comm. on Appropriations*, 94th Cong., 1st Sess. 565-69 (1975) [hereinafter cited as *Senate 1976 Appropriations Hearings*]; *Antitrust Enforcement: Joint Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary and the Subcomm. for Consumers of the Senate Comm. on Commerce*, 94th Cong., 1st Sess. 1-3 (1975) (remarks of Sens. Philip Hart, Magnuson, Moss, and Tunney); *Senate 1973 Appropriations Hearings, supra* note 216, at 1490 (remarks of Sen. McGee).

[263] *See Departments of State, Justice, and Commerce, The Judiciary, and Related Agencies Appropriations for 1981: Hearings Before the Subcomm. on the Departments of State, Justice, and Commerce, The Judiciary, and Related Agencies of the House Comm. on Appropriations*, 96th Cong. 2d Sess. 1 (1980) [hereinafter cited as *House 1981 Appropriation Hearings*; *Senate 1971 Appropriations Hearings*, *supra* note 216, at 1281.

the committees largely agreed with the ABA view that the Commission should not inflate its enforcement statistics through trivial endeavors. One implication of this guidance was that the Commission should pay special attention to raising the overall significance and quality of its caseload, even though the absolute number of matters on its docket might fall below or not exceed pre-1970 levels.[264] On the other hand, Congress sometimes attached great importance to FTC case and investigation statistics. Acknowledging that numbers alone were sometimes a suspect criterion,[265] the committees intimated that greater appropriations ought to yield a higher number of cases and investigations.[266]

Chairman Kirkpatrick and his successors sought, with some difficulty, to convince the committees that the statistics did not reflect reduced FTC antitrust enforcement, but stemmed instead from basic changes in the types of cases the FTC was pursuing.[267] The Commission explained that its more stringent preliminary screening procedures also tended to reduce the number of matters certified as formal investigations.[268] Nonetheless, FTC officials and Congress were unable to resolve what relative values qualitative and quantitative criteria should receive in evaluating the FTC's caseload. The uneasy consensus among the oversight bodies seemed to be that the numbers were neither controlling nor insignificant.

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[264] The Commission's actual experience from 1965 to 1979 shows that the total number of antitrust complaints ranged from 25 in 1965 to 37 in 1976 and again in 1979. The chief departures from this pattern occurred in 1966 when the agency issued 95 complaints (including 73 Robinson-Patman cases), and in 1978 when it filed a low of 12.

[265] *See* R. KATZMANN, *supra* note 213, at 146; *see, e.g., House 1973 Appropriations Hearings*, *supra* note 216, at 407 (Rep. Whitten to Chairman Kirkpatrick: "I know that the number of cases is not always a true test.")

[266] *See House 1973 Appropriations Hearings, supra* note 216 at 407, 427-28; HOUSE 1974 APPROPRIATIONS HEARINGS, *supra* note 222, at 120.

[267] Chairman Kirkpatrick explained the reduction in these terms:

> FTC activities in the past 2 years have put greater emphasis on industry structure, and on seriously anticompetitive behavior. Merger investigations and cases have required increasing staff commitments. Some other examples of relatively more complex antitrust work now in progress: (1) territorial restrictions in distribution of various products; (2) leverage exerted by "power buyers" on the conduct of dominant marketers; and (3) an important monopoly case in the cereal industry.
>
> FTC expects that its efforts to get effective relief in these more complicated antitrust areas will mean that fewer cases will be settled. For this reason, and also because of an increase in complaint recommendations, FTC's litigation burden is on the increase. It is expected to expand significantly in fiscal 1973.

House 1973 Appropriations Hearings, *supra* note 216, at 429.

[268] *House 1974 Appropriations Hearings*, *supra* note 222, at 124-25 (remarks of Rep. Whitten and FTC Executive Director Mezines).

2. Commission Response

During the late 1960's and early 1970's, the ferment within Congress and among commentators about the FTC's antitrust role triggered an extensive process of reform within the FTC.[269] Agency officials took seriously the congressional committees' view that the agency should upgrade its antitrust programs substantially.[270] The Commission understood that the expected product of this overhaul would be innovative, vigorous antitrust enforcement that came to grips with vital competition issues.

FTC efforts to reorient competition programs had several dimensions. In line with congressional preferences, the first priority was to build an effective system for choosing enforcement targets and communicating the agency's objectives to staff.[271] The foundation for this effort was the creation of planning and evaluation offices.[272] The Commission also attempted to integrate its Bureau of Economics more closely into the antitrust program selection process.[273] As a further aid to choosing future enforcement ventures, the Bureau of Economics and the new planning and evaluation offices began devoting more resources to assess the effects of proposed and completed Commission cases.[274]

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[269] In September, 1969 Commissioner Philip Elman told the Senate Judiciary Subcommittee on Administrative Practice and Procedures that the Nader report and the mere pendency of the ABA investigation had stimulated a wide-ranging reexamination of the commission's work by its staff:

> I might also say that a great many of the changes that have taken place at the Commission have taken place in the last 2 or 3 months. And I think they have come under the spur of this new awareness of how much the Commission could be doing and how it has failed to fulfill its full potential. I think the healthiest thing that ever happened to the Federal Trade Commission has been the avalanche of adverse criticism of the past year. And it has been reflected internally.

See 1969 Admin. Practice & Procedure Hearings, *supra* note 216, at 47; *Senate Commerce Committee 1974 Oversight Hearings*, *supra* note 216, at 134-37 (remarks of former Commissioner James Nicholson).

[270] Alan Ward, who directed the Commission's Bureau of Competition in the early 1970's, made this point to the House Special Investigations Subcommittee in 1974:

> Federal Trade Commission law enforcement policies did change in the late sixties. . . . The agency's former enforcement policies, after all, had been severely criticized by almost everyone who knew anything about them—by the bar, respected academicians, congressional committees and consumer groups, and this criticism lead to formation of a Presidential Commission to study whether or not the agency should be abolished. . . .
>
> Before I came to the Commission, the enforcement stance of the Commission was beginning to change. It had already begun to respond to the report of the ABA Commission which urged a concentration "on difficult and complex problems," with which the F.T.C. was uniquely equipped to deal.

House Special Investigation Subcomm. 1974 Hearings, *supra* note 225, at 219-20.

[271] *House 1973 Appropriations Hearings*, *supra* note 216, at 1059.

[272] In 1970, the Commission created an Office of Policy Planning and Evaluation which, through the mid-1970's, assumed increasing responsibility for reviewing competition programs and coordinating FTC planning initiatives. *See, e.g.*, *Senate 1972 Appropriations Hearings*, *supra* note 221, at 2692; *House 1972 Appropriations Hearings*, *supra* note 216, at 94; *House 1973 Appropriations Hearings*, *supra* note 216, at 611, 1062-66. In 1972 the Bureau of Competition created an Evaluation Office to screen proposals for new investigations and to monitor the progress of ongoing projects. *Id.* at 1070. *See also* ABA ANTITRUST SECTION, MONOGRAPH 5, THE FTC AS AN ANTITRUST ENFORCEMENT AGENCY: ITS STRUCTURE, POWERS AND PROCEDURES, VOL. II, at 5-8 (1981).

An important manifestation of the agency's new emphasis on central planning was greater use of the budget process to set priorities. In 1975, the FTC adopted its first program-based budget, which allocated resources according to the types of violations or industry sectors to be examined.[275] At the same time, Commissioners began formally reviewing resource commitments and expenditures twice annually in meetings with bureau directors and staff.[276] The budget review sessions were part of a broader agency effort to translate the product of its planning systems into guidelines for agency staff.[277]

As it developed new planning tools, the Commission sought to improve the information sources it needed to decide which economic sectors and types of industry behavior most deserved antitrust analysis. During his chairmanship, Caspar Weinberger said the Commission wanted to enhance its "ability to monitor more precisely price and profit trends within the array of industries in which it has regulatory responsibility and to collect more detailed data on corporations."[278] In

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[273] The economists' principal planning role was to identify economic sectors worthy of careful antitrust scrutiny. *See, e.g. Senate 1973 Appropriations Hearings*, *supra* note 216, at 1433; *House 1974 Appropriations Hearing*, *supra* note 222, at 989.

[274] *See, e.g., S.J. Res. 253 To Create A National Commission on Regulatory Reform: Hearings Before the Senate Comm. on Commerce*, 93d Cong., 2d Sess. 105-08 (1974) [hereinafter cited as *Regulatory Reform Hearings*]; *House 1972 Appropriations Hearings*, *supra* note 216, at 133-37.

[275] *See, e.g.*, *House 1976 FTC Oversight Hearings supra* note 216, at 5, 7; *see also* R. KATZMANN, *supra* note 63, at 122-25.

[276] The Office of Policy Planning and Evaluation was instrumental in developing the program budget and the periodic review procedure. *See, e.g., Senate Commerce Comm. 1974 Oversight Hearings*, *supra* note 216, at 297; *House 1974 Appropriations Hearings*, *supra* note 222, at 115.

[277] An early step in the direction stemmed from Caspar Weinberger's desire to "probe the frontiers" of the agency's statutes to devise new strategies for addressing competition and consumer protection problems. He notified the agency's staff that "[t]he Commission is receptive to novel and imaginative provisions in orders seeking to remedy alleged unlawful practices." Letter from Casper Weinberger to Senator Edward Kennedy, (July 22, 1970) *reprinted in Kirkpatrick Confirmation Hearings*, *supra* note 216, at 133-36.

Chairman Kirkpatrick and Engman built upon this technique by developing guidelines and using policy protocols to signal changes in priorities or suggest new enforcement strategies. *See, e.g., Senate 1972 Appropriations Hearings*, *supra* note 221, at 7.

[278] Letter from Caspar Weinberger to Sen. William Proxmire (July 9, 1970), *reprinted in Kirkpatrick Confirmation Hearings*, *supra* note 216, at 138. In the letter, Weinberger specified the FTC's needs for the Joint Economic Committee of Congress:

> Access to adequate industry data has become increasingly difficult in recent years as conglomerate firms have moved into a large number of industries. I have previously recommended to Congressional committees that high priority should be given to modification of corporation reporting practices to provide better ability to assess current competitive trends on an industry by industry basis. This will enable the Commission to

1971, FTC Chairman Miles Kirkpatrick reported to the Senate Appropriations Committee that the Commission had transformed Weinberger's suggestions into a concrete project to collect line-of-business data.[279] Majorities in both chambers supported the line-of-business initiative and approved the appropriations needed to carry out the project.[280]

Applying its new planning and priority-setting methods, the Commission earmarked several economic sectors and industries for careful antitrust inquiry. A major criterion for selecting industries for study was the importance of their goods and services to day to day consumer purchases.[281] The FTC established the food,[282] energy,[283] and health care[284] industries as its highest competition priorities.[285] The decision to build comprehensive programs for these industries also reflected the Commission's view that industry-wide analysis afforded the best means for dealing with the underlying causes of poor industry performance.[286]

> evaluate the industry effects of past enforcement activities more effectively and to plan its future programs more specifically.

Id.; *see also House 1975 Appropriations Hearings*, *supra* note 249, at 670 (remarks of Chairman Engman).

[279] *Senate 1972 Appropriations Hearings*, *supra* note 221, at 2643.

[280] *See, e.g., Senate 1976 Appropriations Hearings, supra* note 262, at 707-08; S. Rep. No. 1296, 93d Cong., 2d Sess. 69 (1974). Congressional architects of the program encouraged the FTC to pursue its line-of-business program vigorously. *See, e.g.*, *Senate Commerce Comm. 1974 Oversight Hearings*, *supra* note 216, at 299, 326 (remarks of Sens. Moss and Hart).

Not until 1978, however, after prolonged litigation with firms subject to the program's reporting requirements, did the FTC begin to collect the bulk of data it had sought to obtain. *See In re* F.T.C. Line-of-Business Report Litigation, 1978-2 Trade Cas. ¶ 62,152 (D.C. Cir.), *cert. denied sub. nom.*, American Air Filter Co. v. FTC, 439 U.S. 958 (1978).

[281] *See, e.g., House 1972 Appropriations Hearings, supra* note 216, at 14 (remarks of Chairman Kirkpatrick).

[282] *See, e.g., Senate Commerce Committee 1974 Oversight Hearings, supra* note 216, at 293-94; *House 1972 Appropriations Hearings*, *supra* note 216, at 191-92.

[283] *See, e.g., Senate Commerce Committee 1974 Oversight Hearings*, *supra* note 216, at 293; *House 1972 Appropriations Hearings*, *supra* note 216, at 194-95.

[284] *See, e.g., Senate Commerce Committee 1974 Oversight Hearings*, *supra* note 216, at 294; *House 1972 Appropriations Hearings*, *supra* note 216, at 193.

[285] Although it received somewhat less emphasis, the transportation industry constituted a fourth prominent area of concern. *See, e.g., House 1973 Appropriations Hearings*, *supra* note 216, at 499; *House 1972 Appropriations Hearings*, *supra* note 216, at 193.

[286] In 1974, James Nicholson, who served as an FTC Commissioner from 1968 to 1969, evaluated the FTC's industry-wide approach as follows:

> Through in-depth investigations of certain industries by its staff and its issuance of complaints against prominent firms in the office copier, soft drink and lumber industries, the Commission has announced its willingness to conduct its statutory responsibilities on an aggressive and often industry-wide approach. Thus, the Bureau of Competition appears to have broadened its enforcement perspective to get at the underlying causes of restraints upon competition in industry-wide situations . . . . Such an approach is a more meaningful and efficient way to attempt to remedy the competitive problems in our society.

Senate Commerce Committee 1974 Oversight Hearings, *supra* note 216, at 137 (footnotes omitted).

To address competition problems in these and other economic sectors, the Commission used several enforcement strategies. The most visible approach was litigation.[287] In the first half of the 1970's, the agency initiated a number of significant suits,[288] some of which involved new applications of section 5. The most prominent were the FTC's monopolization and attempted monopolization suits, including suits dealing with ready-to-eat breakfast cereals,[289] petroleum,[290] office copiers,[291] bread,[292] coffee,[293] car rentals,[294] processed lemon juice,[295] and airline schedule guides.[296] These monopolization suits presented special opportunities and difficulties to the FTC in the 1970's. Even as congressional sentiment supported Commission efforts to deal with market structure and firm behavior in several concentrated industries,[297] the agency feared proceeding at a pace that outstripped its resources and its progress in instituting planning, personnel, and management reforms.[298]

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[287] The Commission's litigation efforts corresponded with a de-emphasis of voluntary, nonbinding proceedings which had been criticized by the ABA and Congress. The FTC began limiting the use of assurances of voluntary compliance to minor, inadvertent violations. *See Senate 1972 Appropriations Hearings*, *supra* note 221, at 2684.

[288] One significant criterion for measuring the importance of the FTC's work is the size of respondent firms mentioned in its suits. A recent, preliminary compilation of data suggests that the absolute size of firms sued by the Commission from 1970 to 1979 substantially exceeded the size of those prosecuted in the 1960's. *See FTC Data Indicates Bureau of Competition, Not Antitrust Division, Sights Bigger Targets*, [July-Dec.] ANTITRUST & TRADE REG. REP. (BNA) No. 971, at A-7 (July 3, 1980).

[289] *In re* Kellogg Co., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,898 No. 8883, Apr. 26, 1972), *complaint dismissed*, 3 TRADE REG. REP. (CCH) ¶ 21,864 (Sept. 10, 1981), *appeal denied*, 3 TRADE REG. REP. (CCH) ¶ 21,899 (Jan. 15, 1982).

[290] *In re* Exxon Corp., [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,388 (No. 8934, July 17, 1973), *complaint dismissed*, 3 TRADE REG. REP. (CCH) ¶ 21,866 (Sept. 16, 1981).

[291] *In re* Xerox Corp., 86 F.T.C. 364 (1975) (consent decree).

[292] *In re* ITT Continental Baking Co., [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,784 (No. 9000, Dec. 10, 1974), *order to cease and desist issued*, 3 TRADE REG. REP. (CCH) ¶ 21,823 (May 12, 1981).

[293] *In re* General Foods Corp., [1976-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,173 (No. 9085, July 14, 1976), *complaint dismissed*, 3 TRADE REG. REP. (CCH) ¶ 21,902 (Feb. 3, 1982).

[294] *In re* Hertz Corp., 88 F.T.C. 715 (1976) (consent decree).

[295] *In re* Borden, Inc., 92 F.T.C. 669 (1978), *aff'd*, 1981-2 Trade Cas. (CCH) ¶ 64,558 (6th Cir. 1982).

[296] *In re* Reuben H. Donnelley Corp., 95 F.T.C. 1 (1980) (complaint filed on Apr. 13, 1976), *enforcement denied sub. nom.* Official Airline Guides, Inc. v. FTC, 630 F.2d 920 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 1362 (1981).

[297] *See supra* text accompanying notes 229-47. As late as the fall of 1974, with the *Kellogg*, *Xerox*, *Exxon*, and *Borden* cases underway, some committees were criticizing the Commission on the ground that it had not been sufficiently vigorous in attacking monopoly. The following exchange between Senator Proxmire and Chairman Engman in November, 1974 is illustrative:

> SENATOR PROXMIRE . . . . the FTC, like a number of other regulatory agencies seems to concern itself with minor infractions of the law, and to spend much of its time on cases of small consequences. For example, have you used your powers to investigate the steel industry . . . ?
>
> MR. ENGMAN. We have a study of the steel industry now underway, Mr. Chairman.

A second, major litigation priority was the Commission's merger work.[299] The agency assigned substantial resources to conglomerate mergers with possible horizontal consequences,[300] and continued its scrutiny of more traditional horizontal and vertical acquisitions.[301] A third important category of cases dealt with vertical and horizontal restraints.[302] The Commission challenged vertical territorial restrictions in the soft-drink bottling industry[303] and opposed resale price maintenance and distribution restraints in several consumer goods industries.[304]

The Commission's major initiatives in the horizontal restraints area included cases dealing with delivered pricing in the plywood in-

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> SENATOR PROXMIRE. A study of the steel industry . . . . why hasn't the FTC been more aggressive in this area?
>
> MR. ENGMAN. I think, Mr. Chairman, that the Federal Trade Commission today is very aggressive . . . . We have seen a total turnaround in terms of the types of matters which are being addressed by the Bureau of Competition . . . . I must say that we cannot do everything at one time.

1974 Hearings, supra note 253, at 58-59.

[298] *See Kirkpatrick Confirmation Hearings, supra* note 216, at 140 (remarks of Chairman Weinberger); *House 1974 Appropriations Hearings, supra* note 222, at 144 (remarks of Chairman Engman).

[299] *See, e.g., House 1973 Appropriations Hearings, supra* note 216, at 472-73 (remarks of Chairman Kirkpatrick).

[300] *See, e.g., In re* Beatrice Foods Co., 86 F.T.C. 1 (1975), *aff'd in part, modified in part*, 540 F.2d 303 (7th Cir. 1976); *In re* BOC Int'l, Ltd., 86 F.T.C. 1241 (1975), *rev'd, in part, remanded in part* 557 F.2d 24 (2d Cir. 1977); *In re* Kennecott Copper Corp., 78 F.T.C. 744 (1971), *aff'd*, 467 F.2d 67 (10th Cir. 1972), *cert. denied*, 416 U.S. 909 (1974).

[301] *See, e.g., In re* Warner-Lambert Co., 88 F.T.C. 503 (1976); *In re* Fruehauf Corp., 91 F.T.C. 132 (1978), *enforcement denied*, 603 F.2d 345 (2d Cir. 1979); *In re* Ash Grove Cement Co., 85 F.T.C. 1123 (1975), *aff'd*, 577 F.2d 1368 (9th Cir.), *cert. denied*, 439 U.S. 982 (1978); *In re* Georgia-Pacific Corp., 81 F.T.C. 984 (1972) (consent decree resulting in the creation of Louisiana-Pacific as a new lumber products firm).

[302] *See, e.g., Department of State, Justice, and Commerce, The Judiciary, and Related Agencies Appropriations for Fiscal Year 1977: Hearings Before the Subcomm. on the Deprartment of State, Justice, and Commerce, The Judiciary and Related Agencies of the Senate Comm. on Appropriations*, 94th Cong., 2d Sess. Pt. 4, at 18-19 (1976) [hereinafter cited as *Senate 1977 Appropriations Hearings*].

[303] *In re* Coca-Cola Co., 91 F.T.C. 517 (1978) (complaint issued July 15, 1971), *remanded*, 642 F.2d 1387 (D.C. Cir.), *complaint dismissed*, 3 TRADE REG. REP. (CCH) ¶ 21,845 (July 28, 1981). *See House 1972 Appropriations Comm. Hearings, supra* note 216, at 192; *House Special Investigations Subcomm. 1974 Hearings, supra* note 225, at 26; *Senate Commerce Comm. 1974 Oversight Hearings, supra* note 216, at 293.

[304] *See, e.g., In re* Levi Strauss Co., D. 9081 (May 5, 1976), 92 F.T.C. 171 (1978) (clothing) (consent decree): *In re* Dahlberg Electronics, Inc., 84 F.T.C. 222 (1974) (hearing aids); *In re* Radioear Corp., 82 F.T.C. 1830 (1973) (hearing aids) (consent decree); *In re* Sonotone Corp., 82 F.T.C. 1802 (1973) (hearing aids) (consent decree); *In re* Adolph Coors, 83 F.T.C. 32 (1973) (beer), *aff'd*, 497 F.2d 1178 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975); *In re* Sherwood Elec. Laboratories, Inc., 86 F.T.C. 988 (1975) (audio equipment) (consent decree).

dustry,[305] shopping center leases limiting the entry of discounters,[306] interlocking directorates,[307] and limitations on advertising, pricing of services, and entry in the health care industry.[308] The FTC brought substantially fewer Robinson-Patman cases than it had in the 1960's,[309] and focused more attention on industry-wide investigations, including substantial inquiries in the transportation[310] and health care fields.[311]

Coupled with these new litigation programs was an increased emphasis on monitoring compliance with orders obtained from previous lawsuits.[312] The FTC increased the size of its compliance program,[313] and initiated several important civil penalty actions,[314] many of which applied the new powers Congress had given the agency in 1973.[315]

The second principal element of the Commission's competition policy work was the preparation of reports. The main subjects of its published studies were mergers and acquisitions,[316] energy,[317] and food.[318] An increasing number of these reports responded to legislation directing the FTC to analyze the competitive consequences of newly established regulatory programs,[319] or to examine certain important economic sectors.[320]

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[305] *In re* Boise Cascade, 91 F.T.C. 1 (1978) (complaint issued Apr. 18, 1974), *enforcement denied*, 637 F.2d 573 (9th Cir. 1980).

[306] *In re* Tyson's Corner Regional Shopping Center, 85 F.T.C. 970 (1975).

[307] *See, e.g., In re* Perpetual Federal Savings & Loan Ass'n, 90 F.T.C. 608 (1977), *order withdrawn*, 94 F.T.C. 401 (1979).

[308] *See, e.g., In re* American Medical Association, 94 F.T.C. 701 (1979) (complaint issued Dec. 19, 1975), *aff'd in part, modified in part*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided court*, 1982-1 Trade Cas. (CCH) ¶ 64,616 (1982); *In re* American College of Obstetricians and Gynecologists, 88 F.T.C. 955 (1976) (consent decree).

[309] Except in 1966, the Commission brought about ten Robinson-Patman cases per year from 1965 to 1969. In 1966 the agency issued 73 Robinson-Patman complaints, most being consent cases involving small clothing manufacturers. In the early 1970's the average number of Robinson-Patman suits fell to four per year, and dropped to two per year in the late 1970's.

[310] On August 2, 1976, the Commission authorized an investigation to study the concentration, structure, and performance of the United States automobile industry.

[311] On February 26, 1976, the Commission authorized the Bureau of Competition to investigate physician control of Blue Shield plans.

[312] Senate 1973 Appropriation Hearings, *supra* note 216, at 1433, 1448 (1974); *House 1973 Appropriations Hearings*, *supra* note 216, at 426.

[313] *Id.*; *see also House 1974 Appropriations Hearings*, *supra* note 222, at 171.

[314] *See, e.g*, United States v. Papercraft Corp., 393 F. Supp. 408 (W.D. Pa. 1975); United States v. Beatrice Foods Co., 351 F. Supp. 969 (D. Minn. 1972).

[315] The Commission began using its authority to prosecute violations of outstanding orders in federal court when the Justice Department declined to sue. *See* FTC v. Lukens Steel Co., 454 F. Supp. 1182 (D.D.C. 1978) (complaint filed on June 18, 1974); FTC v. Consolidated Foods Corp., 396 F. Supp. 1353 (S.D.N.Y. 1975).

[316] *See, e.g.*, FTC, Conglomerate Merger Performance: An Empirical Analysis of Nine Corporations (1972); FTC, Economic Report on Corporate Mergers (1969).

[317] *See e.g.*, FTC, Effects of Federal Price and Allocation Regulations on the Petroleum Industry (1976); FTC, Report to the Federal Trade Commission on the Structure, Conduct and Performance of the Western States Petroleum Industry (1975) (joint report by the Bureaus of Competition and Economics); FTC, Concentration Levels and Trends in the Energy Sector of the U.S. Economy (1974).

[318] *See e.g.*, FTC, Price and Profit Trends in Four Food Manufacturing Indus-

The Commission also expanded its competition advocacy efforts before other agencies and branches of the government. The FTC appeared before other federal agencies to comment on the competitive effects of several regulatory programs,[321] often as part of new statutory responsibilities Congress had conferred upon it.[322] The FTC also testified before congressional committees to propose new antitrust legislation or to offer its views on a variety of competition policy matters.[323]

As it upgraded the quality of its case and investigation workload, the FTC also attempted to increase its institutional ability to execute the new competition initiatives successfully. This process of reform had several elements. Among the most fundamental was improving the quality of the agency's staff. Congress generally gave Chairman Weinberger broad latitude to make personnel changes[324] and actively followed his progress in doing so.[325] The recruitment and retention of capable attorneys and economists remained a high priority of Weinberger's successors.[326]

TRIES (1975); FTC, THE U.S. SUGAR INDUSTRY (1975); FTC, ECONOMIC REPORT ON THE DAIRY INDUSTRY (1973).

[319] Most of these statutes dealt with energy. For example, under the Emergency Petroleum Allocation Act of 1973, Congress required the Commission to prepare a comprehensive evaluation of the petroleum allocation program administered by the Federal Energy Office. 15 U.S.C. §§ 751-756 (1976). *See House 1975 Appropriations Hearings*, *supra* note 227, at 647, 688-89, 758-59.

[320] In October 1973, Congress authorized $1 million for an FTC study of energy supply shortages. *See House 1975 Appropriations Hearings*, *supra* note 227, at 646, 658, 717; S. REP. NO. 253, 93d Cong., 1st Sess., 62 (1973).

[321] These agencies included the Interstate Commerce Commission, the Civil Aeronautics Board, the Department of Transportation, the Federal Energy Administration, the Department of the Treasury, the Department of Energy, the Department of Health, Education, and Welfare, and the International Trade Commission.

[322] These statutes explicitly exhibited the congressional desire that the FTC encourage federal bodies to consider the competitive consequences of their regulations. *See Regulatory Reform Hearings*, *supra* note 274, at 133, 148-49. Statutes requiring a greater FTC intervention role before government agencies included the following: Deepwater Port Act of 1974, 33 U.S.C. § 1506 (1976); Energy Policy and Conservation Act of 1975, 42 U.S.C. § 6201 (1976); Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 1 (1976).

[323] Between 1970 and 1980, representatives of the Commission made over thirty appearances annually before Congress to discuss competition matters. In most of those appearances, the Commission discussed proposed changes in the antitrust laws, amendments to regulatory statutes, or competition policy generally.

[324] *Weinberger Confirmation Hearings*, *supra* note 216, at 19 (remarks of Sen. Moss).

[325] *Kirkpatrick Confirmation Hearings*, *supra* note 216, at 1 (remarks of Sen. Magnuson).

[326] *See, e.g.*, *House 1973 Appropriations Hearings*, *supra* note 216, at 1103; *see also* S. BREYER, REGULATION AND ITS REFORM 343 (1981); R. KATZMANN, *supra* note 63, at 117-18, 127-29.

The second major reform was a reorganization in 1970 that gave the Commission the basic form it retains today. The move consolidated the existing bureaus of Textiles and Furs, Industry Guidance, Deceptive Practices, and Restraint of Trade into two principal operating bureaus—Competition and Consumer Protection.[327] The new bureaus, along with the Bureau of Economics, constituted the agency's major divisions. This consolidation substantially reduced the number of levels of review through which staff work had to pass before reaching the Commissioners.[328]

The third approach was to improve the Commission's system for monitoring the status of competition programs and managing information. In 1973 the Commission began developing a comprehensive, computer-based information management system.[329]

A fourth line of endeavor was the establishment of new internal procedures for screening cases, setting deadlines, reviewing the progress of competition matters, and requiring staff members to account for delays.[330] As the cornerstone of these procedures, the Commission expanded its existing ground-level evaluation tools and created new devices (such as the preliminary investigation) to establish, at an early stage, a sufficient basis for deciding whether a matter warranted further expenditure of FTC funds.[331] The improved operating procedures and information management system were designed to reduce delay and to support planning activities.[332]

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[327] *Kirkpatrick Confirmation Hearings*, *supra* note 216, at 133-34; *House 1972 Appropriations Hearings*, *supra* note 216, at 67-73. For a description of these changes, see R. KATZMANN, *supra* note 63, at 113-15, 118-25, 127-29. Of the reorganization and personnel changes Katzmann observes:

> The political climate was conducive to the making of sweeping changes. There existed a consensus across the political spectrum (ranging from President Nixon to Ralph Nader) that held that the commission was performing poorly and should be revitalized. The new leadership was given a clear mandate to alter existing arrangements. It is unlikely that the commission leadership would have been able to move so swiftly in reorganizing and purging the agency of personnel without such widespread support.

Id. at 128. The reorganization plan also created the Office of Policy Planning and Evaluation, discussed above.

[328] *House 1973 Appropriations Hearings*, *supra* note 216, at 1103.

[329] *See, e.g., Senate 1973 Appropriations Hearings*, *supra* note 216, at 1432, 1500-01; *House 1973 Appropriations Hearings*, *supra* note 216, at 457-62.

[330] *Agriculture—Environmental and Consumer Protection Appropriations for Fiscal Year 1975; Hearings Before a Subcomm. of the Senate Comm. on Appropriations*, 93d Cong., 2d Sess., Pt. 2, at 1222-23 (1974) [hereinafter cited as *Senate 1975 Appropriations Hearings*]; *House Special Investigations Subcommittee 1974 Hearings*, *supra* note 225, at 44; *Senate Commerce Committee 1974 Oversight Hearings*, *supra* note 216, at 297.

[331] *See, e.g., House 1974* Appropriations Hearing, *supra* note 222, at 124-25; *House 1973 Appropriations Hearings*, *supra* note 216, at 1068-69.

[332] *Senate 1973 Appropriations Hearings*, *supra* note 216, at 1432.

The Commission also considered revising its administrative procedures to expedite its cases.[333] FTC officials informed the oversight committees that the size, scope, and complexity of the agency's antitrust cases made it difficult, within the bounds of due process, to save time by altering the agency's litigation rules.[334] The Commission changed some rules, but generally maintained that pre-trial preparation, cooperation between the parties, and judicial control of pre-trial proceedings largely determined a case's duration.[335]

Despite the FTC's organizational, management, and procedural reforms, Congress, in late 1975 and early 1976, began questioning the Commission's ability to bring its largest litigation efforts to a timely conclusion. Attention focused on the cereal and petroleum monopolization suits, filed in April 1972 and July 1973.[336] Early in these proceedings Commission officials had informed Congress that cases such as *In re Exxon Corp.*[337] would necessarily be time-consuming and expensive. Some congressmen, who had supported the Commission's actions, regarded the prospect of protracted litigation as unacceptable. Their concern was not that the cases lacked genuine substantive merit but that the aims of these suits were sufficiently urgent to warrant direct legislative action. It was in this spirit, for example, that Congress in 1975 and 1976 seriously considered several proposals to vertically restructure the petroleum industry.[338] However, congressional proponents of legislative action suggested that the FTC discontinue the *Exxon* case only if Congress promptly accomplished by statute what the FTC suit conceivably might attain at a later date.[339]

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[333] *House 1973 Appropriations Hearings*, *supra* note 216, at 512-13. Early in the 1970's Congress had pointed to procedural reform as a way to expedite FTC antitrust suits. *Id.* at 512.

[334] *See id.* at 512 (remarks of Rep. Evans and Chairman Kirkpatrick).

[335] *See id.* at 512-13 (remarks of Chairman Kirkpatrick).

[336] The *Xerox* suit ended in a consent decree in 1975. *See supra* note 291.

[337] [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,338 (No. 8934, July 17, 1973), *complaint dismissed*, 3 TRADE REG. REP. (CCH) ¶ 21,866 (Sept. 16, 1981). In discussing *Exxon* in 1974 before the House Appropriations Committee, James Halverson, Director of the Bureau of Competition, observed that "the prediction of a 10-year period before final disposition [on appeal] . . . is not an unreasonable one." *House 1975 Appropriations Hearings*, *supra* note 227, at 683.

[338] On October 8, 1975, the Senate defeated by a vote of 45 to 54 a vertical divestiture measure offered as an amendment to a pending piece of energy legislation. *See* 121 CONG. REC. 32,289-96 (1975). Two weeks later, on October 22, a modified version of the vertical divestiture proposal was reintroduced as amendment to the same energy bill and was defeated by a vote of 40 to 49. *See* 121 CONG. REC. 33,593-616 (1975). On June 15, 1976, the Senate Committee on the Judiciary approved and reported to the full Senate a bill (S. 2387) requiring the vertical divestiture of the nation's eighteen largest oil companies. *See* S. REP. No. 1005, 94th Cong., 2d Sess, Pt. 1 (1976). The Judiciary Committee bill did not reach the Senate floor.

[339] For example, Senator Packwood, who co-sponsored a vertical divestiture bill in the 94th Congress, argued that new legislation afforded a speedier, less costly alternative to litigation:

B. *1977-1980*

By the fall of 1976, the FTC had attained perhaps its greatest level of congressional respect. Congress seemed generally pleased with the Commission's renewed antitrust enforcement approach. Certainly, the objective measures of legislative feeling supported such a conclusion. Since 1969, both the agency's total budget and competition expenditures had more than doubled, and Congress had significantly expanded its statutory authority. Less tangible, but nonetheless important, indications of congressional opinion pointed in the same direction. In a report on federal regulatory bodies issued in October of 1976, the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce largely praised the FTC's competition work, stating that the FTC had become "one of the more effective regulatory agencies."[340] There was little question that Congress endorsed the course which the FTC's competition programs had taken.[341]

> Over 2 years ago . . . the FTC charged eight majors with violating the Federal Trade Commission Act. . . .
>
> [T]his case has not even reached the hearing stage, and is likely to drag on into the 1980's. The time and expense to the Nation can be avoided by congressional action which will insure that competition is restored now.

1975 Petroleum Vertical Integration Hearings, *supra* note 229, at 49. He went on to suggest that the existing antitrust laws might be inadequate to deal with certain competition problems:

> The present antitrust laws . . ., even if rigidly enforced, will not achieve what is necessary in this country: A breakup of the concentrations of power in the major industries in this country, oil and otherwise, so that we might return to the numerous, small- and medium-size competitive industries that made this country grow, and continue to be needed to keep this country great.

Id. at 50; *see also, e.g., Consumer Energy Act of 1974: Hearings Before the Senate Comm. on Commerce*, 93d Cong., 2d Sess., Pt. 4, 1538, 1630 (1974) (remarks of Sen. Tunney).

[340] Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong. 2d Sess. Report on Federal Regulation and Regulatory Reform 57 (Subcomm. Print 1976) [hereinafter cited as 1976 House Report]. Noting that the FTC had been criticized previously for "excessive concentration upon matters of small consequence," the House report applauded the Commission's efforts "to consider some major antitrust and consumer protection problems." *Id.* The report singled out the FTC's cereal and petroleum monopolization suits, its challenge to advertising restrictions by the American Medical Association, and its investigation of the automobile industry as examples of a desirable trend in this direction.

The following year the Senate Governmental Affairs Committee (successor to the Committee on Government Operations) also praised the FTC's antitrust revitalization and used the agency's competition performance since 1969 as one basis for recommending the maintenance of the dual antitrust enforcement system. *See* Study on Federal Regulation: Regulatory Organization. Senate Comm. on Governmental Affairs, 95th Cong., 2d Sess., Vol. v., at 246-54 (1977) [hereinafter cited as Senate Governmental Affairs 1977 Report]. Compared to other committee studies of the FTC's work written earlier in the decade, these reports suggested a progressively greater level of congressional satisfaction with the Commission's performance from 1969 up to 1977. For one of the earlier, less flattering assessments, see *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1976: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 94th Cong., 1st Sess. Pt. 7, at 187-278 (1975).

[341] For example, a business periodical article on the FTC noted that "[W]ith its turnabout to

Although the Commission's antitrust work had enjoyed solid congressional backing through 1976, the durability of this support was much less certain. Major segments of the business community viewed the content and tone of the agency's new antitrust and consumer protection programs with alarm, and spoke increasingly of seeking substantial, legislatively-mandated retrenchment of the agency's litigation, rulemaking, and information-gathering efforts.[342] When the first session of the 95th Congress convened in January 1977, the legislature's membership had changed significantly. The roster no longer included the names of Philip Hart, Vance Hartke, Mike Mansfield, Gale McGee, Frank Moss, John Pastore, and John Tunney,[343] senators who had been strong advocates of the Commission's antitrust revitalization and influential in mustering congressional support for the agency's ambitious programs and the enlargement of its budget and statutory powers.[344]

As programs begun in the early and mid-1970's came to fruition in the late 1970's, the Commission would be unable to rely on the support of many key individuals who had championed its initiatives. Instead, it would have to justify its competition projects before a Congress that had significantly less stake in defending or maintaining FTC work begun through 1976 and possessed a stronger inclination to review new proposals more critically. Moreover, it was a Congress more likely to listen sympathetically to claims that the agency had erred in its choice and execution of competition programs.[345]

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activism, the agency has clearly won the approval of Congress." *The Escalating Struggle Between the FTC and Business—Executives Openly Challenge the Actions and Policies of the Newly Activist Agency*, Bus. Wk. 53 (Dec. 13, 1976) [hereinafter cited as *Business Week* 1976]. Some observers at this time also believed the agency's status in Congress would likely improve in the future with the appiontment of Michael Pertschuk, an influential Senate staff member, to chair the FTC. *See Caught in a Cross Fire of Praise at the FTC*, N.Y. Times, Mar. 20, 1977, § 3, at 3, col. 1.

[342] For a perceptive discussion of the business mood at the time, see Bus. Wk. 1976, *supra* note 341, at 52.

[343] Senators Hart, Mansfield, and Pastore retired and did not seek re-election in 1976, and Senators Hartke, McGee, Moss, and Tunney were defeated in the general election. The departure of these Senators marked the beginning of a process of erosion in the ranks of congressmen who had urged the commission to occupy ever larger territory in the antitrust and consumer protection field. This process continued in 1978 with the deaths of Lee Metcalf and Hubert Humphrey; the retirement of James Abourezk; and the election defeat of Dick Clark, Floyd Haskell, and Thomas McIntyre.

[344] As a group, these senators had held a disproportionate number of important positions in the Senate hierarchy generally and occupied pivotal seats on committees with appropriations and oversight responsibility for the FTC's work.

[345] Through a review of voting records, Weingast and Moran document a major shift in Congressional preferences for FTC policy. "The oversight committee," they write, "experienced a nearly complete turnover in 1977 that brought to power members opposing the polices of their predecessors." Weingast & Moran, *supra* note 9, at 46.

1. Congressional Guidance

From 1977 through 1980, the oversight and appropriations process did not constitute a complete departure from earlier legislative scrutiny of the agency's competition programs. The Congress continued to develop many themes that had emerged at the decade's beginning.

Like their predecessors in the early 1970's, the committees encouraged the Commission to refine its system for selecting priorities and choosing enforcement programs.[346] Both chambers placed greater emphasis on the use of cost-benefit studies by the agency in choosing future cases and investigations.[347] In another area, closely related to planning and case selection, Congress sustained its support for the agency's line-of-business program.[348] The oversight committees expressed concern about the delays occasioned by lawsuits challenging the program and considered (but did not enact) legislation to expedite the data collection.[349] The appropriations committees continued to fund the program, but also urged the Commission to reduce as much as possible its reporting requirements.[350]

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[346] *See Departments of State, Justice, and Commerce, The Judiciary, and Related Agencies Appropriations for Fiscal Year 1980: Hearings Before a Subcomm. of the Senate Comm. on Appropriations*, 96th Cong., 1st Sess., Pt. 2, at 2156-57, 2162-63 (1979) [hereinafter cited as *Senate 1980 Appropriations Hearings*]; *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1979: Hearings Before a Subcomm. of the Senate Comm. on Appropriations*, 95th Cong., 2d Sess., Pt. 5, at 1707-08 (1978) [hereinafter cited as *Senate 1979 Appropriations Hearings*].

[347] *See, e.g., House 1981 Appropriation Hearings, supra* note 263, at 201; *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1981: Hearings Before a Subcomm. of the Senate Comm. on Appropriations*, 96th Cong., 2d Sess., Pt. 2, at 408 (1980) [hereinafter cited as *Senate 1981 Appropriations Hearings*]; *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1980: Hearings Before the Subcomm. on the Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies of the House Comm. on Appropriations*, 96th Cong., 1st Sess., Pt. 2, at 804 (1979) [hereinafter cited as *House 1980 Appropriations Hearings*]; *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1979: Hearings Before the Subcomm. on the Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies of the House Comm. on Appropriations*, 95th Cong., 2d Sess., Pt. 3, at 1013 (1978) [hereinafter cited as *House 1979 Appropriations Hearings*]; *Departments of State, Justice, and Commerce, the Judiciary and Related Agencies Appropriations for Fiscal Year 1978: Hearings Before the Subcomm. on the Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies of the Senate Comm. on Appropriations*, 95th Cong., 1st Sess., Pt. 5, at 546 (1977) [hereinafter cited as *Senate 1978 Appropriations Hearings*].

[348] For example, in 1977, Representative Moss told the House Subcommittee on Consumer Protection and Finance that the successful completion of the line-of-business program was essential to the continuing revitalization of the FTC's competition programs. *Federal Trade Commission Amendments of 1977 and Oversight: Hearings Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. 101-02 (1977) [hereinafter cited as *House 1977 FTC Oversight Hearings*].

[349] In 1977, Representative Eckhardt, Chairman of the Subcommittee on Consumer Protection and Finance, proposed giving the FTC increased statutory power to overcome procedural obstacles to collecting the line-of-business data. *Id.* at 1-2.

Congressional interest in planning and priorities was part of a broader concern with the FTC's ability to manage its programs capably. As they had done earlier in the decade, the committees pressed the Commission to closely monitor its use of resources and to expedite ongoing cases and investigations.[351] The committees also questioned the FTC's care in using compulsory process in its investigations.[352]

Beyond analyzing the Commission's planning and management systems, Congress specified several types of competition problems and particular industries the FTC should scrutinize. Though less forcefully than it once had, Congress continued to regard economic concentration as meriting serious antitrust attention. During antitrust enforcement oversight hearings in 1977, Senator Paul Laxalt commented: "To me, the undue concentration of economic power in this country is troublesome. I think that undue concentration constitutes as big a threat to the individual liberties of Americans as anything that I can perceive."[353] Similarly, in March 1980, Representative Neal Smith of the House Appropriations Committee advocated a continuing concern with certain oligopoly industries during hearings on the FTC's 1980 budget request:

> I happen to be one who thinks that you ought to be spending a lot of time on some major problems, such as oligopolies which have a direct impact and effect upon inflation in this country. This is especially true in food processing and some

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[350] *See Senate 1978 Appropriations Hearings*, *supra* note 347,at 548-55.

[351] *See Senate 1979 Appropriations Hearings*, *supra* note 346, at 1708; *House 1981 Appropriations Hearings*, *supra* note 347, at 207-09. The FTC's *Exxon* and *Kellogg* monopolization suits most often provided the point of departure for discussing the agency's management skills. *See, e.g., House 1979 Appropriations Hearings*, *supra* note 347, at 1077; *Senate 1978 Appropriations Hearings*, *supra* note 347, at 505-06. For example, committee members questioned the turnover rate for attorneys assigned to these cases. *See Senate 1980 Appropriations Hearings*, *supra* note 346, at 2086. The FTC's ability to retain new attorneys beyond a period of several years had concerned Congress earlier in the decade as well. *See Senate 1975 Appropriations Hearings*, *supra* note 330, at 1204-05; *Interfuel Competition: Hearings on S. 489 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 313-15, 522-23 (1975) [hereinafter cited as *Interfuel Competition Hearings*]. Some members suggested that the agency consider contracting for the services of outside, experienced lawyers. *House 1974 Appropriations Hearings*, *supra* note 222, at 144-45. The Committees also raised the possibility of narrowing the issues in the *Exxon* case. *See House 1980 Appropriations Hearings*, *supra* note 347, at 823.

[352] *See House 1980 Appropriations Hearings*, *supra* note 347, at 875. On occasion, the committees seemed surprised at the suggestion that the FTC had the power or the inclination to conduct an investigation solely for the purpose of gathering information about an industry. *See Senate 1981 Appropriations Hearings*, *supra* note 347, at 380.

[353] *Oversight of Antitrust Enforcement: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 5 (1977) [hereinafter cited as *Senate Judiciary 1977 Oversight Hearings*]; *see also id.* at 2-3 (remarks of Sen. Kennedy, Subcomm. Chairman).

> areas where imports do not keep a cap on domestic prices or have an impact as they do in some areas of manufacturing.[354]

Merger enforcement also remained an area of antitrust concern that Congress believed the FTC should assign a high priority. In 1979, the Senate Appropriations Committee asked the Commission what action it had taken "in response to the current conglomerate merger wave?"[355] Later that year, Senator Kennedy introduced two merger bills, one limiting large conglomerate acquisitions[356] and the other prohibiting the nation's sixteen largest oil companies from purchasing any firm with $100 million or more in assets.[357] As it considered these proposals, the Senate Judiciary Committee also encouraged the FTC to use its statutory power to block anticompetitive acquisitions.[358]

In enumerating specific economic sectors for scrutiny, Congress reaffirmed its interest in energy, food, medical care, and transportation. Congress occasionally singled out other areas of economic activity for FTC attention, including concentration in the ownership of the news media.[359] Of the industries already receiving FTC attention, Congress stressed energy. The appropriations committees directed the FTC to expedite the energy industry studies which had been funded by a special congressional appropriation in the early 1970's.[360] Congress also substantially expanded the Commission's competition advocacy responsibilities under several new energy statutes, including the Petroleum Marketing Practices Act of 1978,[361] the Outer Continental Shelf Lands Act Amendments of 1978,[362] the National Energy Conservation Policy Act of 1978,[363] and the Powerplant and Industrial Fuel Use Act of 1978.[364] Each of these measures required the agency to assess the competitive consequences of various government regulatory programs.

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[354] *House 1981 Appropriations Hearings*, *supra* note 263, at 143. *See also* Senate Government Affairs 1977 Report, *supra* note 340, at 246.

[355] *Senate 1980 Appropriations Hearings*, *supra* note 346, at 2145. One year earlier Senators Kennedy and Metzenbaum had urged the antitrust enforcement agencies to devise new strategies for dealing with large conglomerate acquisitions. *See Mergers and Industrial Concentration: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 1-3, 143-44, 185-86 (1978) [hereinafter cited as *Senate 1978 Merger Hearings*].

[356] *See Mergers and Economic Concentration: Hearings on S. 600 Before the Subcomm. on Antitrust, Monopoly, and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979) [hereinafter cited as *S. 600 Hearings*].

[357] *See Energy and Antimonopoly Act of 1979, S. 1246: Hearings on S. 1246 Before the Subcomm. on Antitrust, Monopoly, and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess., Pt. 1 (1979) [hereinafter cited as *S. 1246 Hearings*]. Similar legislation received the support of President Carter. *Id.* at 370-74.

[358] *See Senate Judiciary 1977 Oversight Hearings*, *supra* note 353, at 6-8 (remarks of Sen. Metzenbaum).

[359] In 1978, the Senate Appropriations Committee submitted the following written question concerning media ownership to the Commission:

> Last year Arthur Sulzberger, publisher of the New York Times, noted that the American newspaper industry is probably the one unregulated business left in the world. In terms of employment the newspaper industry is the third largest in America, and only behind automobiles and steel. What interest does the FTC have in this area? . . . Can you bust the media trusts with current statutes? . . . What causes your inability to challenge media acquisitions and the concentration of press power in the hands of a few giant companies?

Senate 1979 Appropriations Hearings, *supra* note 347, at 1729.

[360] *House 1979 Appropriations Hearings*, *supra* note 347, at 1076-77.

The food industry also remained a high antitrust priority for Congress, but different areas of interest were suggested.[365] The House Appropriations Committee suggested that the Commission pay more attention to food retailing[366] and the beef processing industry.[367]

Congress gave close, and often critical, scrutiny to three other major FTC competition initiatives during this period: The automobile investigation, the *Formica* trademark cancellation suit, and cases affecting the professions. The House and Senate Appropriations Committees were especially apprehensive about the automobile inquiry's purpose and scope.[368] They were concerned that the Commission had slighted the role of foreign automobile makers and had imposed excessive document demands upon American firms.[369]

The committees also expressed reservations over the agency's effort to cancel the Formica trademark on the ground that the name had become generic.[370] In 1979, the House Appropriations panel intensively questioned the Commission about its Formica investigation,[371] and whether the case foreshadowed far-reaching efforts to cancel other well-known trademarks.[372] Early in the same year, several bills were introduced in the House to bar the FTC from exercising its powers to cancel a trademark on the ground that the mark has become a common, descriptive name.[373]

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[361] §§ 101-106, 201-205, 301, 15 U.S.C. §§ 2801-2841 (Supp. IV 1980).

[362] Pub. L. No. 95-372, 92 Stat. 629 (1978) (codified in scattered sections of 43 U.S.C.).

[363] §§ 101-691, 42 U.S.C. §§ 8201-8278 (Supp. III 1979).

[364] §§ 101-902, 42 U.S.C. §§ 8301-8483 (Supp. III 1979).

[365] *See House 1979 Appropriations Hearings*, *supra* note 347, at 987-90; *House 1980 Appropriations Hearings*, *supra* note 347, at 771-73.

[366] *House 1980 Appropriations Hearings*, *supra* note 347, at 771-73.

[367] *Id.* at 771-72 (remarks of Rep. Andrews).

[368] *See* H.R. REP. No. 1253, 95th Cong., 2d Sess. 47 (1978).

[369] *See, e.g.*, *Senate 1980 Appropriations Hearings*, *supra* note 346, at 2030-31, 2081; *House 1979 Appropriations Hearings*, *supra* note 347, at 1001, 1056-57. The Committees proposed that the FTC expand its analysis of foreign car manufacturers and curtail the breadth of its requests to domestic companies.

[370] FTC v. Formica Corp., 5 TRADE REG. REP. (CCH) ¶ 50,372 (1978).

[371] *House 1980 Appropriations Hearings*, *supra* note 347, at 817 (Rep. Early to Chairman Pertschuk: "On what grounds did the FTC bring this action, a fishing expedition?").

[372] *Id.* at 816, 817, 821.

The third troublesome FTC initiative was the agency's competition work involving the professions, particularly its programs affecting lawyers and physicians.[374] The Senate Antitrust Subcommittee in 1977, and the Senate Appropriations Committee in 1977 and 1979 questioned the Commission about its interest in professional associations.[375] Although the appropriations and oversight panels did not explicitly oppose the program or suggest its modification, the tone of their inquiries conveyed a sense of discomfort with this initiative.

2. Commission Response

The oversight and appropriations hearings from 1977 to 1980 revealed a perceptible change in congressional attitudes toward the FTC's competition programs. Until late 1979, this adjustment was a relatively quiet one. Congress continued to endorse many of the same initiatives it had promoted earlier in the decade, including the FTC's line-of-business, energy, and food programs. Moreover, it had sustained the pattern of budget increases set in the early 1970's, raising the Commission's total appropriation from about $47 million in 1976 to nearly $70 million in 1980. Mixed with these threads of continuity, however, were important differences in tone and emphasis. Before 1976, majorities in both chambers of Congress encouraged the FTC to test the boundaries of its authority. After 1976, Congress was less amenable to further expansion and considerably more disposed to scrutiny of ambitious FTC antitrust ventures already underway.

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[373] *See, e.g.*, Remarks of Rep. Andrew Maguire in introducing H.R. 3865, *reprinted in* [Jan.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 911, at A-19 (Apr. 26, 1979).

[374] In his economic message to Congress on October 8, 1974, President Ford had urged careful antitrust scrutiny of horizontal agreements concerning professional services. The President said:

> I am determined to return to the vigorous enforcement of antitrust laws.
>
> The Administration will zero in on more effective enforcement of laws against price-fixing and bid-rigging. For instance, noncompetitive professional fee schedules and real estate settlement fees must be eliminated. Such violations will be prosecuted by the Department of Justice to the full extent of the law.

H.R. DOC. NO. 366, 93d Cong., 2d Sess., *reprinted in* 120 CONG. REC. 34,421, at 34,422 (1974).

[375] Senator Laxalt and Chairman Pertschuk discussed the basis for the agency's interest in this field:

> SENATOR LAXALT. Explain to me the concern in connection with the various professional groups on this level as opposed to inquiring into the problem on a state level.
>
> MR. PERTSCHUK. The Commission, beginning 2 to 3 years ago, as part of its policy planning process, had identified these areas as ones in which the competition was simply not working in which price fixing, barriers to entry, restrictions against advertising, or other restraints were causing excessively high prices to consumers, and excluding competitors. These were identified as areas in which a high potential payoff in terms of consumer benefit and restoring competition could lie. There are clearly very serious questions about Federal-State relations in the Commission's entering this area. And there are questions about the extent of the Commission's authority in this area.
>
> The Commission is proceeding in a careful and gingerly way to identify those areas in which the restraints on competition are most egregious with justification least strong and least evident for state action.

Senate Judiciary 1977 Oversight Hearings, *supra* note 353, at 13. *See Senate 1978 Appropriations Hearings*, *supra* note 347, at 546; *Senate 1980 Appropriations Hearings*, *supra* note 346, at 2159-61.

In fulfilling its antitrust role from 1977 to 1980, the Commission was responsive to these changes in congressional attitude. This was particularly evident in the agency's efforts to strengthen its processes for selecting priorities and managing its work. The enhancement of the FTC's priority and program selection techniques proceeded along four lines. The first was the establishment in 1977 of an Office of Special Projects and a Planning Office within the Bureau of Competition.[376] The Office of Special Projects was given responsibility for identifying and examining long-range economic factors, such as technological change, which influence the competitive process.[377] The Planning Office focused upon developing legal and economic analysis for use in selecting new cases and refining the theoretical underpinnings of ongoing suits and investigations.[378] This office also directed most of the Commission's efforts to measure the effects of its completed antitrust cases.[379]

The second major refinement of the agency's planning mechanism was the improvement of priority selection tools that enabled the Commission to periodically examine the FTC's workload and evaluate proposals for new projects. In 1977, the Commission commenced a series of monthly meetings to review the agency's activities in a given subject area and explore future strategies.[380] From 1977 through 1980, the FTC conducted "policy review sessions" for the automobile industry, compliance activities, mergers, health services, media ownership, and the Commission's industry-wide enforcement programs.[381] During the same period, the Commission expanded its budget review process, a planning mechanism whose potential the agency began to tap in the first half of the decade.

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[376] *See New Beginnings for Antitrust Enforcement at the Federal Trade Commission*, Address by Alfred Dougherty, Jr., Ohio State Bar Ass'n Annual Antitrust Law Inst. (Oct. 28, 1977) [hereinafter cited as Dougherty *1977 Speech*]; *Senate 1980 Appropriations Hearings*, *supra* note 412, at 2162-63. The two new offices were created as part of a reorganization that realigned the Bureau's litigation offices along programmatic lines. The move was designed to enable the agency's litigators to build expertise in certain industry sectors (e.g., food).

[377] *See, e.g., Antitrust, Competition Policy, and the Emerging Industry*, Address by Albert Foer, Roundtable on Antitrust and Technology of the New York State Bar Ass'n (Jan. 23, 1980). The Special Projects staff also served as the FTC's liaison for a variety of interagency task forces and carried out competition advocacy duties under new statutes requiring the FTC to monitor the competitive consequences of new technologies.

[378] One major area of Planning Office work has consisted of analysis of the agency's substantive and remedial authority. *See, e.g.*, Averitt, *supra* note 13; Averitt, *supra* note 143.

[379] For a discussion of these efforts, see *Senate 1981 Appropriations Hearings*, *supra* note 347, at 408; *House 1981 Appropriations Hearings*, *supra* note 263, at 202.

[380] *See New Directions for the FTC*, address by Michael Pertschuk, New England Antitrust Conference (Nov. 18, 1977) [hereinafter cited as Pertschuk *1977 Speech*].

The third major change in the agency's planning system was increased effort to more fully integrate its economists into both the selection of competition programs and the generation of cases and investigations.[382] In an attempt to accomplish this, agency-wide task forces of lawyers and economists were created to examine existing areas of antitrust concern,[383] and assess possible new areas of inquiry.[384]

The fourth key area of planning and priority selection work was the enlargement and improved use of the agency's information sources. The Commission published its first analysis of data obtained through its line-of-business program,[385] and extensively used information received through its pre-merger notification program under the Hart-Scott-Rodino Act of 1976.[386] As it employed these new data sources in planning and evaluating enforcement programs, the agency made its internal data sources more accessible to staff.[387]

Consistent with the interest of the oversight and appropriations committees, the Commission placed greater emphasis on managing its workload effectively. This manifested itself in several areas of the agency's competition work. First, the FTC finished installing the chief elements of the management information system begun in the early

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[381] The Commission's Office of Policy Planning coordinated the policy review meetings and prepared briefing books for the sessions. The briefing books were subsequently edited and made public. *See* 3 TRADE REG. REP. (CCH) ¶ 11,000 (1980).

[382] Chairmen Collier and Pertschuk identified this as a major Commission objective in their appearances before the appropriations committees. *See Departments of State, Justice, and Commerce, the Judiciary, and Regulatory Agencies Appropriations for Fiscal Year 1978: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 95th Cong., 1st Sess. 4 (1977) [hereinafter cited as *House 1978 Appropriations Hearings*]; *House 1979 Appropriations Hearings*, *supra* note 347, at 814.

[383] *House 1979 Appropriations Hearings*, *supra* note 347, at 813-14.

[384] *Id.* Subjects explored in this manner include energy, food, health care, transportation, mergers, joint ventures, and remedies. *See* Dougherty *1977 Speech, supra* note 376.

[385] *See* BUREAU OF ECONOMICS, STATISTICAL REPORT: ANNUAL LINE OF BUSINESS REPORT 1973 (March 1979).

[386] *See* Malcolm Pfunder, Remarks on Premerger Notification Before the American Law Institute—American Bar Association (Nov. 20, 1980), *reported in* [July-Dec] ANTITRUST & TRADE REG. REP. (BNA) No. 991, at A-6 to A-7 (Nov. 27, 1980).

[387] *See* note 388 *infra*. In addition, the Bureau of Competition also began to catalogue the products of past and ongoing Commission research and to see that staff benefited from the fruits of this body of work. *Id.*

1970's.[388] Second, the agency exerted more stringent early review of case and investigation proposals. The planning and priority selection reforms outlined above were one step in this direction. Another ingredient was the expanded role of the Bureau of Competition's Evaluation Office and Evaluation Committee in examining recommendations for complaints and investigations.[389]

The Commission and the Bureau of Competition applied a more rigorous analysis to the agency's existing information-gathering programs, investigations, and lawsuits. In 1979, the FTC substantially reduced the number of stock and asset acquisitions that must be reported under the agency's pre-merger notification provisions.[390] The following year, the Commission narrowed the scope of both its automobile industry investigation[391] and its *Exxon* monopolization suit,[392] measures which the Congress had urged the agency to consider.[393]

In selecting industries for competition study, the Commission mainly examined industries providing consumer goods and services.[394] The FTC devoted over half of its antitrust resources to the energy,[395] food,[396] health care,[397] and transportation[398] industries. The agency used a variety of approaches to raise competition concerns about these and other industries.

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[388] The system afforded FTC commissioners and other supervisory officials the first truly effective means for obtaining reliable, timely information on the status of ongoing investigations and cases, as well as the disposition and content of closed matters. *See House 1981 Appropriations Hearings*, *supra* note 263, at 207-10; *Senate 1979 Appropriations Hearings*, *supra* note 347, at 1708; *House 1978 Appropriations Hearings*, *supra* note 382, at 97, 104. The Agency also strengthened its computer systems for collecting and organizing data used in major litigation projects. *Id.* at 104.

[389] *House 1978 Appropriations Hearings*, *supra* note 382, at 4. This type of preliminary analysis, coupled with efforts to evaluate and learn from the agency's previous lawsuits, helped the Bureau of Competition to limit the scope of its investigations and narrow the issues raised in its complaints. For a discussion of the effects of these reforms on the litigation of one recent FTC suit, see Crock, *Here's One Case The Trustbusters May Finish Soon*, Wall St. J., May 17, 1979 at 26, col. 3 (analyzing the progress of the Commission's *DuPont* monopolization suit).

[390] *See* FTC, ANN. REP. 13 (1979); *FTC Proposes Easing Merger Reporting Rules*, Wall St. J. Aug. 22, 1979 at 2, col 2.

[391] *Senate 1981 Appropriations Hearings*, *supra* note 347, at 376, 383.

[392] *See In re* Exxon: *Complaint Counsel's First Statement of Issues, Factual Contentions and Proof* (Oct. 31, 1981) (on file with author). *See also FTC Narrows Case Against 8 Oil Firms But Alleges Possible Price 'Conspiracy'*, Wall St. J. Nov. 3, 1980, at 19, col. 2. Two months later the FTC's staff also filed a statement in the *Exxon* proceeding outlining its views on relief. *See F.T.C. Staff Eases View In Oil Case*, N.Y. Times Feb. 3, 1981, at D-1, col. 6.

[393] On the auto investigation, *see supra* notes 335-36. On the *Exxon* case, *see supra* note 351.

[394] *House 1981 Appropriations Hearings*, *supra* note 263, at 12; *House 1980 Appropriations Hearings*, *supra* note 347, at 572, 583; *House 1979 Appropriations Hearings*, *supra* note 347, at 813, 972; *House 1978 Appropriations Hearings*, *supra* note 382, at 3, 11.

[395] *See supra* note 394; *see also House 1979 Appropriations Hearings*, *supra* note 347, at 818,936.

[396] Note 394 *supra*; *see also House 1979 Appropriations Hearings*, *supra* note 347, at 819,937.

[397] Note 394 *supra*; *see also House 1979 Appropriations Hearings*, *supra* note 347, at 820, 969 & 972.

[398] Note 394 *supra*; *see also House 1979 Appropriations Hearings*, *supra* note 347, at 819.

Among the most salient initiatives begun from 1977 to 1980 were Commission lawsuits. The FTC brought significant antitrust cases dealing with monopolization and attempted monopolization,[399] mergers,[400] horizontal restraints,[401] and vertical restraints.[402] The Commission issued complaints or decisions in several important cases involving complex legal and economic issues such as strategic entry deterrence, predation, and the acceptable range of dominant firm behavior generally;[403] market signalling among firms in concentrated markets;[404] the *Colgate* doctrine;[405] and the lawfulness of various vertical, horizontal, and conglomerate mergers.[406] Other important facets of the Commission's litigation work included increased cooperation with state governments seeking to apply the results of FTC investigations in their own lawsuits;[407] greater use of injunctions to halt potentially anticompetitive mergers;[408] and the development of new remedial devices such as restitution.[409]

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[399] *See, e.g.*, *In re* E.I. DuPont de Nemours & Co., 96 F.T.C. 653 (1980); *In re* Sunkist Growers, Inc., [1976-1979 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 21,315 (No. 9100, May 31, 1977), *consent order issued*, 3 Trade Reg. Rep. (CCH) ¶ 21,793 (May 5, 1981).

[400] *See, e.g.*, *In re* Exxon Corp., 3 Trade Reg. Rep. (CCH) ¶ 21,599 (No. 9130, Aug. 1, 1979); *In re* Beatrice Foods Corp., [1976-1979 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 21,437 (No. 9112, June 29, 1978), *order to cease and desist issued*, 3 Trade Reg. Rep. (CCH) ¶ 21,775 (Nov. 21, 1980).

[401] *See, e.g.*, *In re* Ethyl Corp., [1976-1979 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 21,579 (No. 9128, May 30, 1979), *order to cease and desist issued*, 3 Trade Reg. Rep. (CCH) ¶ 21,856 (Aug. 12, 1981); *In re* Indiana Dental Ass'n, 93 F.T.C. 392 (1979) (consent order).

[402] *See, e.g.*, *In re* Russell Stover Candies, Inc., 3 Trade Reg. Rep. (CCH) ¶ 21,719 (No. 9140, July 1, 1980).

[403] *See, e.g., In re* Borden Inc., 92 F.T.C. 669 (1978), 1981-2 Trade Cas. (CCH) ¶ 64,558 (6th Cir. 1982); E.I. duPont de Nemours & Co., 96 F.T.C. 653 (1980); *In re* Reuben H. Donnelly Corp., 95 F.T.C. 1 (1980), *enforcement denied* sub nom. Official Airline Guides, Inc., v. FTC, 630 F.2d 920 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 1362 (1981).

[404] *In re* Ethyl Corp., [1976-1979 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 21,579 (No. 9128, May 30, 1979).

[405] *In re* Russell Stover Candies, Inc., 3 Trade Reg. Rep. (CCH) ¶ 21,719 (No. 9140, July 1, 1980), *complaint dismissed*, 3 Trade Reg. Rep. (CCH) ¶ 21,[illegible] (Mar. 16, 1981).

[406] *See e.g.*, *In re* Exxon Corp., 3 Trade Reg. Rep. (CCH) ¶ 21,599 (No. 9130, Aug. 1, 1979); *In re* Heublein, Inc., 96 F.T.C. 385 (1980).

[407] *See House 1978 Appropriations Hearings*, *supra* note 382, at 16.

[408] *See, e.g.*, FTC v. Exxon Corp., 1979-2 Trade Cas. (CCH) ¶ 62,972 (D.D.C. 1979); FTC v. Southland Corp., 471 F. Supp. 1 (D.D.C. 1979); *see also House 1979 Appropriations Hearings*, *supra* note 347, at 1034; ABA Monograph No. 5, Vol. II, *supra* 272, at 72-81. E. Rockefeller, Desk Book of FTC Practice and Procedure 115 (3d ed. 1979) ("The Commission has been successful in using the threat of a preliminary injunction to force concessions.").

[409] *See In re* Binney & Smith, Inc., 96 F.T.C. 625 (1980); Milton Bradley Co., 96 F.T.C. 638 (1980); *see also Companies Ante Up $1.2 Million for Antitrust Restitution*, Legal Times of Wash., Mar. 26, 1980, at 9, col. 1.

These litigation projects, however, constituted only one of several Commission approaches for developing competition policy. Programs to stimulate research, analysis, and discussion of important antitrust issues were also an important strategy. From 1977 to 1980, for example, the Commission sponsored conferences on solar energy industry competition;[410] health care competition;[411] media concentration;[412] social consequences of firm size and market structure;[413] predation and modern antitrust analysis;[414] and commercialization of new technologies.[415]

The study of significant competition issues took other forms as well. In this period the FTC's attorneys and economists published working papers, protocols, and articles dealing with numerous matters including business strategy,[416] predatory practices,[417] trademarks,[418] innovation,[419] the limits and purposes of the FTC's enabling acts,[420] and the measurement of market power.[421] In addition the Commission funded outside research by distinguished academicians on mergers,[422] dynamic economic analysis,[423] and the competitive effect of government procurement practices.[424] These research projects supplemented reports by the Bureaus of Competition and Economics.[425]

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[410] *See* FTC, The Solar Market: Proceedings of the Symposium on Competition in the Solar Energy Industry (June 1978).

[411] *See* FTC, Competition in the Health Care Sector: Past, Present and Future (June, 1977).

[412] *See* Bureau of Competition FTC, Proceedings of the Symposium on Media Concentration (Dec. 1978).

[413] *See* FTC, The Economics of Firm Size, Market Structure and Social Performance (July 1980).

[414] *See* Bureaus of Economics and Competition, FTC, Strategy, Predation, and Antitrust Analysis (Sept. 1981) [hereinafter cited as Strategy, Predation, and Antitrust Analysis].

[415] *See* Office of Special Projects-Bureau of Competition, FTC, The Competitive Implications of Government-Assisted Commercialization Programs: Conference Summary (Oct. 3, 1980).

[416] *See, e.g.*, Salop, *Strategic Entry Deterrence*, 69 Am. Econ. Rev. 335 (1979); E. Morrison & R. Craswell, Papers on Business Strategy (Sept. 1980).

[417] *See, e.g.*, Hilke, *Advertising Predation and the Areeda-Turner and Williamson Rules*, 1980 J. Reprints Antitrust L. & Econ. 367; J. Hurwitz, W. Kovacic, T. Sheehan, & R. Lande, *Current Legal Standards of Predation*, in Strategy, Predation, and Antitrust Analysis, *supra* note 414, at 101.

[418] *See, e.g.*, R. Craswell, Trademarks, Consumer Information and Barriers To Competition, (Jan. 1979).

[419] *See, e.g.*, J. Hilke & C. Goldfarb, The Relationship Between FTC Activities and Private Sector Technological Growth (Oct. 16, 1978).

[420] *See supra* note 347.

[421] *See, e.g.*, Kwoka, *The Effect of Market Share Distribution on Industry Performances*, 61 Rev. Econ. & Statistics 101 (1979).

[422] *See* W. Boucher, The Process of Conglomerate Mergers (1980); W. Carleton, R. Harris & J. Stewart, An Empirical Study of Merger Motives (1980). These studies were funded jointly by the FTC and the Small Business Administration.

[423] *See* Strategy, Predation, and Economic Analysis, *supra* note 414.

Another important field was competition advocacy. The Commission expanded the intervention role it began earlier in the decade, and participated in many proceedings before other government agencies.[426] In addition, the Commission considered the use of rulemaking as a competition enforcement approach.[427] The FTC considered, but declined to issue rules governing certain conglomerate mergers; barring physician organizations from controlling Blue Shield; and other open-panel medical prepayment plans and prohibiting the ownership of crude oil and petroleum products pipelines by major integrated oil companies.[428]

3. Proposed Limitations

In 1979 and 1980, congressional dissatisfaction with some elements of the FTC's competition and consumer protection work swelled into a forceful movement to curtail certain specific projects and to redefine the agency's underlying authority.[429] The intensity and breadth of this drive have been equalled only twice before in the agency's history—in the meatpacking report[430] and *Cement Institute*[431] confrontations discussed earlier. Divisions within both chambers over the extent of restrictions to be imposed were so severe that the Commission's funding lapsed on two occasions, forcing the agency to close its doors for the first time ever.[432] The Commission had gone without an authorization bill for fiscal years 1978, 1979, and 1980—a portent of the discontent that surfaced graphically in congressional consideration of the Federal Trade Commission Improvements Act of 1980.[433]

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[424] *See* W. Baldwin, The Impact of Department of Defense Procurement on Competition in Commercial Markets: Case Studies of the Electronics and Helicopter Industries (1980).

[425] From 1977 to 1980 the Commission published many staff studies, including reports on selected concentrated industry sectors and issues earmarked by Congress for examination earlier in the decade. *See, e.g.*, FTC, Market Shares, Concentration and Competition in Manufacturing Industries (1978); Bureau of Economics, FTC, Sales, Promotion, and Product Differentiation in Two Prescription Drug Markets (Feb. 1977); *see also* FTC Ann. Rep. 77-80 (1980).

[426] *See, e.g.*, *House 1981 Appropriations Hearings*, *supra* note 263, at 142; *Senate 1981 Appropriations Hearings*, *supra* note 347, at 389; *House 1979 Appropriations Hearings*, *supra* note 347, at 969; *see also* FTC, Ann. Rep. 81-85 (1980). A brief summary of the types of FTC intervention and commenting activities in the energy and transportation fields since 1976 indicates the program's scope and its importance to the agency's competition policy role. For the Department of Energy, the FTC prepared comments on a variety of regulations affecting petroleum prices and supplies. For the Interstate Commerce Commission, the Commission supplied comments in several proceedings dealing with pricing and entry for various categories of motor carriers. For the Civil Aeronautics Board, the Commission provided comments on several matters affecting fares charged by domestic air carriers. For the Department of Interior, the Commission supplied comments on policies governing bids for leases to develop offshore oil and gas properties. For the Department of Transportation, the Commission in 1979 assessed the competitive implications of the application of the Texas Deepwater Port Authority to build a deepwater terminal facility in the Gulf of Mexico.

[427] *See* Address by A. Dougherty, Council on Antitrust and Trade Regulation of the Federal Bar Association (Mar. 29, 1978) (*New Directions in Antitrust Enforcement: Competition Rulemaking*); Schorr, *FTC Plans to Promote Competition by Use of Rules Now Limited to Consumer Area*, Wall St. J. Jan. 26, 1977, at 38, col. 1.

[428] FTC consideration of a possible pipeline rule began with the filing by Senator Kennedy of a petition calling upon the Commission to commence such a proceeding. *See* 44 Fed. Reg. 35,237 (1979).

Most of its provisions dealt with the consumer protection programs, but the Act also affected several FTC competition matters. It prohibited the FTC from petitioning the Commissioner of Patents for cancellation of a registered trademark on the ground that the trademark had become the common, descriptive name for an article or substance.[434] The Act barred the Commission from conducting any study or investigation of agricultural marketing orders or prosecuting agricultural cooperatives for conduct exempt from the antitrust laws by the

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[429] For three contemporaneous assessments of the reasons behind congressional moves to limit the Commission's authority in 1979 and 1980, see *Debate: The Federal Trade Commission Under Attack: Should the Commission's Role be Changed?* 49 ANTITRUST L.J. 1481 (1982) (remarks by William Baxter, Philip Elman, Miles Kirkpatrick, and Robert Pitofsky); Gellhorn, *The Wages of Zealotry: The FTC under Siege,* Jan./Feb. 1980 AEI J. ON GOV'T AND SOC'Y 33; Katzmann, *Capitol Hill's Current Attack Against the FTC*, Wall St. J., May 7, 1980, at 26, col. 3; M. Pertschuk, *supra* note 9. Among the more perplexing tasks in attempting to explain this display of legislative feeling is to determine the extent to which congressional displeasure with the FTC's competition and consumer protection work contributed to the final result, or, alternatively, whether the opposition aroused by either the FTC's competition or consumer protection programs separately would have precipitated such a searching and, at times, impassioned review of the agency's activities. Equally troublesome is to appraise the degree, if any, of additional scrutiny and rebuke the agency received by serving as an outlet for deep-seated, popular frustrations with government behavior that are only partly attributable to the FTC's work. The answers to these and other questions are important to determining what lasting significance congressional actions will have for the Commission's competition role.

[430] *See supra* text accompanying notes 186-97.

[431] *See supra* text accompanying notes 198-08.

[432] The Commission formally ceased operations for two days in 1980 (May 1 and June 2). Brown, *FTC Temporarily Closed in Budget Dispute*, Wash. Post, May 1, 1980, at B-1, col. 1; Sulzberger, Jr., *After Brief Shutdown, FTC [illegible] More Funds*, N.Y. Times, May 2, 1980, at D-1, col. 1. Some congressmen regarded the fund[illegible] approvingly. Rep. Quillen said, "[T]he way to kill a rattlesnake is to cut its head off. [illegible] what we ought to do today." 126 CONG. REC. H2196 (daily ed. Mar. 26, 1980).

[433] Pub. L. No. 96-252, 94 Stat. 374 [illegible] (codified in scattered sections of 15 U.S.C.).

[434] This provision effectively terminated the Commission's Lanham Act proceeding to cancel the Formica trademark, marking the first time in the agency's history that Congress had intervened to eliminate an ongoing FTC adjudicatory proceeding. The *Formica* case was in discovery when the 1980 authorization Act was passed. The Trademark Trial and Appeal board dismissed the FTC's cancellation petition on June 13, 1980, and the FTC staff then moved for the Commission to formally close the matter.

Capper-Volstead Act.[435] The other limitation directly affecting the Commission's choice of possible competition initiatives was a ban on investigations relating to the business of insurance unless such studies were authorized by a vote of either the House or Senate Commerce Committee.[436]

The only other specific antitrust restriction to gain Congress' approval in this period was the Softdrink Interbrand Competition Act of 1980,[437] which exempts soft drink bottlers' exclusive territorial franchises from antitrust challenge so long as there is competition in the area from other soft-drink brands.[438] The Act culminated long efforts by the bottlers to gain relief from the FTC's suit challenging the industry's exclusive geographic territories.[439]

In addition to the restrictions it did enact, Congress considered other measures to limit the agency's competition work. The House Appropriations Subcommittee nearly banned further funding for the Commission's automobile industry investigation and *Exxon* monopolization suit;[440] Senator Hatch introduced a bill to require the FTC to bring all of its antitrust cases in the federal district courts, thus eliminating the agency's adjudicatory function in the competition field;[441] and during consideration of the Senate version of the FTC's authorization bill, Senator McClure offered an amendment prohibiting FTC scrutiny of state-regulated professions.[442] Finally, Senator Heflin proposed eliminating the Commission's power to order divestiture or other forms of structural relief in non-merger cases.[443]

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[435] The statute allowed the agency to complete its ongoing monopolization suit against the Sunkist Growers. *See supra* note 399.

[436] In a measure that affects the agency's competition investigations, the Act required all compulsory process to be signed by a Commissioner acting pursuant to a Commission resolution. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 6, 94 Stat. 374, 384 (1980) (codified at 15 U.S.C. § 46 (Supp. IV 1980).

[437] Pub. L. No. 96-308, 94 Stat. 939 (1980) (codified at 15 U.S.C. § 3501-03 (Supp. IV 1980)).

[438] *See id.*

[439] Since 1972, Congress had given extensive consideration to bills similar to the 1980 Act. *See, e.g.*, *House Committee Approves Bottlers Bill Allowing Territorial Restrictions*, [Jan.-June] Antitrust & Trade Reg. Rep. (BNA) No. 973, at A-14 (June 1, 1976). The 1980 Act swept through Congress with overwhelming support, as 310 congressmen co-sponsored the House bill alone.

[440] *See* Sinclair, *House Panel Acts to Curb FTC Probes*, Wash. Post, Sept. 14, 1979, at A-11, col. 5-6.

[441] *See* [July-Dec.] Antitrust & Trade Reg. Rep. (BNA) No. 938, at G-1 (Nov. 8, 1979).

[442] *See Senator Proposes Limitations on FTC's Jurisdiction Over Professional Groups*, [July-Dec.] Antitrust & Trade Reg. Rep. (BNA) No. 938, at A-22 (Nov. 8, 1979). If approved such a measure would have ended the agency's competition proceedings dealing with the legal, medical, and dental professions. Sims & Smith, *FTC Assault: A Modern-day Roman Circus*, Legal Times of Wash., Dec. 10, 1979, at 18, col. 1. The McClure proposal failed by two votes to gain Senate approval. 126 Cong. Rec. S 1116 (daily ed. Feb. 6, 1980).

[443] *See Federal Trade Commission—Divestiture: Hearing Before the Subcomm. for Consumers*

The policy views behind these measures were present in Congress in the early 1970's but were held by only a minority of the congressional membership. Thus, though not a complete break from the past, these actual and proposed restrictions signified a basic change in the attitudes and preferences regarding the role of the FTC that Congress had expressed for most of the decade. Significantly, recent experience indicates that this congressional sentiment to pursue reversal of earlier legislative policies has scarcely abated, even though FTC actions since 1980 have effectively mooted, in whole or in part, some of the antitrust restrictions that failed to win approval from the 96th Congress.[444] Despite passage of the 1980 Improvements Act and the Commission's self-restraint, congressional advocates of further limits on the agency's competition authority are now poised to accomplish major, unfinished elements of the legislative agenda from 1980.

IV. CONCLUSION

Congress in 1914 gave the Federal Trade Commission expansive competition authority in large measure because the legislature expected to play an active role in ensuring that the agency faithfully pursued the enabling statute's goals. Rigorous congressional review of the FTC's competition programs fits squarely within the system of careful legislative oversight that Senator Cummins envisioned 68 years ago.[445] Indeed, it should startle no one that the 97th Congress would closely appraise the Commission's antitrust initiatives or evaluate its competition policy role. From this Article's examination of the FTC's experience since 1969, and the forces that have shaped its evolution since 1914 emerge several considerations that are relevant to current congressional debate over the Commission's future.

The first consideration concerns the proper basis for altering the

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of the Senate Comm. on Commerce, Science, and Transportation, 96th Cong., 2d Sess. 1-5 (1979). If enacted the Heflin measure would have effectively barred the Commission from ordering divestiture in its ongoing monopolization suits, notably the *Kellogg* and *Exxon* cases. Id. at 9-16 (remarks of Commissioner Pitofsky). Perhaps more than any other proposed antitrust limitation to receive attention in 1979 and 1980, the Heflin bill represented an abrupt departure from the tone and substance of congressional guidance in the 1970's concerning the Commission's powers. *See id.* at 97-110.

[444] For example, since passage of the 1980 Act, the Commission has closed its investigation of the automobile industry and discontinued its cereal and petroleum monopolization suits. *See supra* notes 289-90; *FTC Drops Cereals Case*, [Jan.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 1048, at 154 (Jan. 21, 1982); *FTC Drops Complaint in Exxon Proceeding*, [July-Dec.] ANTITRUST & TRADE REG. REP. (BNA) No. 1031, at A-28 (Sept. 17, 1981). These initiatives were subjects of one or more of the restrictions discussed above.

[445] *See* text accompanying note 120 *supra*.

FTC's statutory charter. Although the desirability of scrupulous congressional oversight is beyond dispute,[446] the grounds on which some members of Congress now propose to restrict the FTC's antitrust powers are questionable. Congress can legitimately probe many aspects of the agency's competition performance and ask searching questions about both the substantive merits of the Commission's antitrust programs and the skill with which the FTC has carried them out; but there is no principled basis for curtailing the agency's antitrust authority on the premise that the Commission has contradicted congressional guidance.[447] The FTC's choice of competition programs and enforcement strategies during the 1970's was consistent with the legislature's articulated preferences. And new limiting legislation that grounds itself on the Commission's supposed past infidelity to Congress' will builds on an illusion.[448]

An issue closely related to the consistency of FTC programs with congressional guidance is whether Congress in fact exerts meaningful influence over the Commission's choice of enforcement programs.[449]

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[446] As Joseph Harris states the principle, "It is not enough for a legislature to enact policies . . . into law; it must check to see how those policies are being executed, whether they are accomplishing the desired results, and, if not, what corrective action the legislature may appropriately prescribe." J. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION 1 (1964).

[447] As Robert Katzmann commented in May of 1980, "it is clear that the [Commission's] activities in the last decade have not not defied congressional policy expressions." Katzmann, Capitol Hill's Current Attack Against the FTC, Wall St. J., May 7, 1980, at 26, col. 3.

This Article has focused upon congressional guidance concerning the FTC's antitrust activities, but its conclusions are largely applicable to congressional oversight of Commission consumer protection programs, as well. Many such initiatives, which have been the subject of intense congressional criticism in recent years, received strong legislative support in the early and mid-1970's. The Commission's efforts to regulate television advertising directed toward children is an outstanding example. Several oversight and appropriations committees directed the Commission to give this program a high priority and to emphasize binding enforcement strategies, rather than voluntary, cooperative programs with industry. *See, e.g.*, *Senate Commerce Comm. 1974 Oversight Hearings*, *supra* note 216, at 2, 309, 317, 344, 347 (remarks of Sens. Moss and Pastore); *Senate 1975 Appropriations Hearings*, *supra* note 330, at 1190-95 (remarks of Sen. McGee); *see also* S. REP. NO. 285, 95th Cong., 1st Sess. 53 (1977)

> The [Senate Appropriations] Committee shares the Commission's growing concern about the effects of advertising on children. The Committee therefore encourages the Commission to review its current expenditures to determine if sufficient funds can be made available from fiscal year 1977 resources to implement a viable program in this critical area.

Id.

[448] Weingast and Moran argue that congressional complaints that the FTC failed to abide by legislative guidance should instead be acknowledged as dissatisfaction with the prevailing policy views of Congress in the early to mid-1970's. They write: "Despite the political rhetoric about a runaway, uncontrollable bureaucracy being responsible for the 1979-81 sanctions, . . . these sanctions were instead tied to the committee changeover that brought to bear congressional control due to legislators with markedly different preferences." Weingast & Moran, *supra* note 9, at 46.

[449] There is an active debate among commentators over the extent to which Congress controls the activities of the FTC and other regulatory agencies. One view contends that independent

Many of the proposed reforms now under congressional review stem from the assumption that Congress at present exercises only minimal control over the FTC's activities.[450] A major implication of the analysis in this Article is that the substantial congruency of congressional antitrust preferences and FTC antitrust programs in the 1970's was not mere coincidence. Rather, the 1970's were a period of powerful legislative influence in the Commission's competition activities. From 1969 to 1976 in particular, Congress used virtually every tool at its disposal to move the FTC toward far-reaching applications of its antitrust powers. With great force and effect, Congress stressed that the Commission's well-being depended upon its development of ambitious, aggressive enforcement programs.[451] Moreover, the history of congressional oversight since 1914 indicates that the FTC would not have pursued such a course had Congress not urged it to do so. To depict the 1970's as a time in which Congress functioned as an inattentive, ineffective overseer, leaving the FTC to account only to itself, stands the situation on its head.[452]

Beyond questioning some proposed bases for limiting the Com-

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regulatory bodies generally operate independently of the legislature. In this model, congressional oversight of regulatory agencies is largely ineffective in influencing agency behavior. *See, e.g.*, K. Clarkson & T. Muris, *supra* note 9 at 18-34; J. WILSON, THE POLITICS OF REGULATION 391 (1980); L. DODD & R. SCHOTT, CONGRESS AND THE ADMINISTRATIVE STATE 2 (1979). The opposing view holds that regulatory agency actions are the products of congressional guidance. Under this model, Congress has a decisive impact on agency behavior through its use of a variety of incentive systems. *See, e.g.*, W. CARY, POLITICS AND REGULATORY AGENCIES 57-59 (1967); D. MAYHEW, *supra* note 215, at 134-35; Weingast & Moran, *supra* note 9, at 45-47.

[450] *See* Weingast & Moran, *supra* note 9, at 46-47.

[451] This was the message, for example, in Senator McGee's advice in 1971 to Miles Kirkpatrick that the Commission should err on the side of trying too much, rather than attempting too little. *See supra* text accompanying note 221. It was also the spirit in which Senator Stevens told Lewis Engman in 1973 to become a "real zealot" in executing his duties as FTC Chairman. See *supra* text accompanying note 224.

[452] The argument that the Commission operated in the 1970's without effective external constraints assumes that institutions other than Congress which might have restrained the agency declined to do so. In assessing the role of the federal judiciary in this period, for example, some commentators have concluded that the federal courts gave uncritical review to FTC cases that rested upon disputed or expansive applications of the agency's authority. *See, e.g.*, K. Clarkson & T. Muris, *supra* note 9, at 35-49. Some decisions of this period, such as the Supreme Court's opinion in FTC v. Sperry & Hutchinson Co., 405 U.S. 223 (1972), unquestionably gave a broad reading to the agency's substantive powers. But an arguably truer measure of the closeness of judicial scrutiny in the 1970's and its influence upon the Commission is the manner in which courts, in the latter part of the decade, reviewed the products of specific, concrete attempts by the FTC to apply what nominally was a generous definition of its authority. A review of decisions on the merits by the federal courts and the Commission itself in antitrust cases decided from 1977 to 1980, however, reveals no apparent inclination to give the FTC a free rein in its choice and prosecution of antitrust theories. *See, e.g.*, Official Airlines Guides, Inc. v. FTC, 630 F.2d 920 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 1362 (1981); Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980); *In re* E.I. duPont de Nemours & Co., 96 F.T.C. 653 (1980).

mission's authority, this Article also suggests several factors that deserve serious consideration during the current congressional debate. One important factor in weighing the merits of the agency's antitrust performance would be to review what Congress expected of the agency throughout the 1970's. From the FTC's creation in 1914 to the present, Congress and the nation generally have expected things of the Commission at different times. Any contemporary evaluation of the FTC's record that does not take into account the rules to which the Commission was expected to conform in the 1970's cannot serve as a reliable guide for prescribing the agency's future activities or rewriting its statute. A complete and accurate assessment must necessarily acknowledge changes in the views of congressmen and commentators about what constitutes good performance.[453]

Historical retrospection would shed light upon the Commission's record in at least one other important respect. By almost any yardstick, the past decade has differed markedly from any in the FTC's past. The tremendous expansion (by way of judicial interpretation and statute) of the agency's substantive, remedial, and investigatory powers; major, sustained budget increases; and the sudden, substantive reorientation of its competition and consumer protection agendas placed immense strains on the Commission. These developments required it to simultaneously develop new planning and management systems and to initiate programs that fulfilled the more ambitious role Congress expected it to perform. Recent years seem to have produced a gradual consolidation of the agency's expanded resources, authority, and management and planning reforms. Outward signs of this trend include stronger emphasis on planning, research, and preliminary screening in choosing and shaping competition programs; closer attention to program management and the refinement of information systems on which such management greatly depends; and greater sensitivity to theoretical and practical concerns affecting the economically sensible application of competition policy. The legislative activity of the past few years often has tended to obscure these significant developments.

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[453] The assumptions by which commentators have criticized regulatory agency performance have depended greatly on the age in which the criticism is delivered and the enforcement preferences of the commentators. For example, in his lectures on *The Administrative Process* in 1938, James Landis described the main failing of administrative agencies in these terms:

> The pressing problem today . . . is to get the administrative to assume the responsibilities that it properly should assume. Political and official life to too great an extent tends to favor routinization. The assumption of responsibility by an agency is always a gamble that may well make more enemies than friends. The easiest course is frequently that of inaction. A legalistic approach that reads a governing statute with the hope of finding limitations upon authority rather than grants of power with which to act decisively is thus common.

J. LANDIS, THE ADMINISTRATIVE PROCESS 75 (1938). His lectures were given at a time when, as he put it, "the drive against monopoly on the part of the Federal Trade Commission [had] dwindled into a mere campaign against false advertising . . . ." *Id.* at 113.

As this Article has suggested, congressional expectations can vary considerably over time, as well. For example, one cannot fully understand the origins or approach of the recently concluded generation of government monopolization cases concerning the computer, telephone, breakfast cereal, and petroleum industries without reference to the congressional and academic ferment that supported such initiatives in the late 1960's and early 1970's. *See supra* note 444; *Justice Settles AT&T Case*, [Jan.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 1047, at 82 (Jan. 14, 1982); *Antitrust Division Dismisses IBM Case*, [Jan.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 1047, at 88 (Jan. 14, 1982).

Finally, a broad historical review would offer a useful perspective on what substantive functions the FTC should serve in the antitrust field. Congress in 1914 perceived a serious need for an administrative body that could incrementally adjust the boundaries of antitrust law to conform with modern learning in law and economics. As it prescribes the FTC's antitrust role for the 1980's, Congress might profitably consider whether its predecessors' conception of the agency in 1914 suits its needs today. This issue, not an imagined refusal of the Commission to heed legislative guidance, arguably lies at the heart of the matter.

COMMENTARY

THE FUNCTION AND DYSFUNCTION OF PER SE RULES IN VERTICAL MARKET RESTRAINTS

JOHN J. FLYNN[*]

I. INTRODUCTION

In 1963, the Supreme Court held it did not know enough about the "economic and business stuff" out of which nonprice vertical market restraints "emerge" to determine whether they should be measured by a "rule of reason" test or one of "per se illegality."[1] Seventeen years later, after one flip[2] and one flop[3] (or vice-versa depending on your view) by the Court and extensive academic speculation on all sides of the issue,[4] only one certain conclusion remains: We do not know enough to generalize conclusively about the impact of a wide variety of vertical nonprice restraints on the preservation of a competitive process and the goals of antitrust policy, which the process seeks to achieve.

In the debate and court decisions, which continue to wrestle with various aspects of the question, fixed theological convictions and factual speculation too often are substituted for a factually based, but principled, analytical process. Court decisions appear to substitute concept shoving, ad hoc ideological decisions, or factual speculation about hypothetical cases not before the Court for a reasoned and understandable method for resolving issues raised by controversies over vertical nonprice restraints. Academic debate on the issue sometimes proceeds from closed systems of fixed beliefs that claim the "oughts" of the belief determine the "is" of reality or that the "is" of reality cannot hope to do other than conform to the "oughts" of the beliefs wrapped up in the model if the legal system would only allow reality to operate free of intervention.[5] Other commentators indulge in general factual speculation derived from a particular hypothesis of limited observed phenomena, by claiming that the general factual speculation or observed phenomena can decide particular cases in the future only if overriding weight be given that particular hypothesis or slice of reality. One can read and ponder samples of each type of criticism and become impressed by the logic of the analysis, the persuasiveness of the approach, and the sincerity of the advocate, yet conclude that we do not know enough to reach firm conclusions about the antitrust implications of vertical market restraints. If we did know enough about the "stuff" of vertical market restraints, why then the growing number of law review articles offering different approaches and opposing solutions?

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[1] White Motor Co. v. United States, 372 U.S. 253, 263 (1963).

[2] United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) (Court used "per se violation" test).

[3] Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) ("per se" test overruled in favor of "rule of reason" test).

[4] In addition to the articles cited by Professors Stewart and Roberts, 58 WASH. U.L.Q. 727 (1980), other articles of particular note include: Altschuler, Sylvania, *Vertical Restraints and Dual Distribution*, 25 ANTITRUST BULL. 1 (1980); Bohling, *A Simplified Rule of Reason for Vertical Restraints: Integrating Social Goals, Economic Analysis and* Sylvania, 64 IOWA L. REV. 461 (1979); Goldberg, *The Law and Economics of Vertical Restrictions: A Relational Perspective*, 58 TEX. L. REV. 91 (1979); Pitofsky, *The* Sylvania *Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 COLUM. L. REV. 1 (1978); Williamson, *Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transaction Cost Approach*, 127 U. PA. L. REV. 953 (1979); Zelek, Stern & Dunfee, *A Rule of Reason Decision Model After* Sylvania, 68 CALIF. L. REV. 13 (1980).

The proliferation of divergent proposals for antitrust analysis of vertical restraints makes clear that the Court's conclusions and method of analysis in *Continental T.V., Inc. v. GTE Sylvania, Inc.*[6] are just as incomplete and full of unknown implications as the Court's conclusions and methodologies in *United States v. Arnold, Schwinn & Co.*[7] Some aspect of the assumptions and methodology of each opinion, or the lack of them, suggests that the Court has grabbed a few of the relevant issues, but not all of them or even all sides of the few. The *Schwinn* opinion made the test for legality and illegality a wooden application of the venerable doctrine of restraints on alienation. The *Sylvania* opinion, however, makes conclusive as a test for legality, the wooden application of an abstract, artificial, and theoretical analysis of one brand of neoclassical economic thought.[8] Both cases represent an either/or mentality when reality, the facts of cases, common sense, the legal process, and the goals of antitrust policy call for something in between these bright line rules. Professors Stewart and Roberts demonstrate partially why bright line rules are inadequate in their analysis of the implications of *Sylvania* for other per se rules and their proposals for resolution of the ambiguities raised by *Sylvania*. Their proposed solutions, a series of complex rules stressing the quantitative impact of particular restraints, however, strike me as theoretically titillating, but practically unworkable and undesirable standards for efficient and effective implementation of antitrust policy in the context of the judicial process. The problem is not one initiated by Stewart and Roberts because it is not their analysis that generates the complexity. Rather, the Court's opinion in *Sylvania* causes the difficulty. The problem is a broader one than merely the manipulation of some of the unstated and often unrealistic factual assumptions of the neoclassical paradigm implicitly relied on by the Court in *Sylvania* in order to develop standards that account for more of the reality of vertical market restraints than permitted by the paradigm and *Sylvania*. A re-evaluation of the Court's assumptions of fact and value, as well as the Court's skill in the use of the legal process in *Sylvania*, is necessary to suggest sensible standards for other areas of per se and rule of reason analysis.

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[5] These methods of analysis are characteristics of advocates making particular economic models the premise of antitrust analysis. Not only are the assumptions of the model carried over to antitrust analysis of specific cases, but also the deductive application of the method of the school of economic analysis is carried into the legal analysis of specific cases. When this occurs, only those factual explanations of the dispute consistent with the preordained model and its assumptions are the permitted explanations of the conduct before the Court. Thus, the "oughts" of the belief determine the "is" of reality. In the case of disciples of a rigid following of neoclassical theory, who see most government intervention in the market as counterproductive to the "efficient" functioning of the "market," they believe reality cannot hope but to conform to the dictates of the "market" if the legal system would only leave it alone. For pre-*Sylvania* analysis of vertical restraints with these tendencies, see Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Divisions (pt. II)*, 75 YALE L.J. 373 (1966); Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282 (1975).

[6] 433 U.S. 36 (1977).

[7] 388 U.S. 365 (1967).

In view of the limitations of the task Stewart and Roberts set out for themselves, the Authors did not pursue extensively an inquiry into the merits of the *Sylvania* Court's substantive assumptions and methodology. They question instead the significance of some of the Court's assumptions, account for a broader slice of the reality of vertical restraints than involved in *Sylvania*, substantially ignore the potential of criticizing the Court's methodology, and compile a list of substantive rules to determine—category by category—the outcome of future litigation. It is a thoughtful and useful project, but one that does not go far enough in view of the significant implications of the *Sylvania* decision. Rather than limit this inquiry to the post-*Sylvania* vitality of other per se rules in terms of the *Sylvania* analysis and methodology, the task requires first a critical examination of the goals of antitrust policy posited by *Sylvania* and shortcomings in the methodology by which the Burger Court implemented those goals through a common-law process of analysis.

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[8] *See* Flynn, *The Role, if Any, of Economic Analysis in Antitrust Litigation—A Response*, 12 Sw. U.L. Rev. —— (1980).

Schwinn and *Sylvania* are symptomatic of some deeper problems in both the evolution of antitrust policy and the Court's skill in carrying out its function of enforcing the antitrust laws. These are problems that will not be resolved by fiddling with this and fiddling with that to arrive at a list of substantive rules tracking *Sylvania*, which one may carry to future frays with the misguided confidence of a law student entering an examination with an outline of simplistic rules but little understanding of the policies behind those rules and no method for either intelligently invoking them, determining their meaning, or applying them.

II. ASSUMPTIONS OF THEOLOGY AND METHODOLOGY

Because Stewart and Roberts do not confront directly the *Sylvania* Court's assumption of a particular brand of economic theory as the theological predicate for analysis of vertical market restraints and the methodology employed by the Court for making the theology decide particular cases, the Authors engage in the practical task of divining the implications of what is an unartful and inappropriate exercise of the judicial process by the Burger Court. In *Sylvania* the majority identified several potential commercial justifications for imposing vertical market restraints.[9] The Court assumed that a manufacturer would not ordinarily impose those restraints in light of the neoclassical theory that assumes maximization of unit sales and revenues by a firm assumed to be operating under the dictates of a perfectly competitive market, making presumably rational decisions, dealing with presumably rational distributors, and marketing to presumably rational consumers.[10] The

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[9] 433 U.S. at 54-56.

[10] The following observation is of a type found often in the *Sylvania* opinion:

> Generally a manufacturer would prefer the lowest retail price possible, once its price to dealers has been set, because a lower retail price means increased sales and higher manufacturer revenues. In this context, a manufacturer is likely to view the difference between the price at which it sells to its retailers and their price to the consumer as its 'costs of distribution,' which it would prefer to minimize.

433 U.S. at 56, n.24 (citing Posner, *Antitrust Policy and The Supreme Court: An Analysis of the*

Court used one kind of economic theorizing to test reality and used the theory in the end of the analysis, rather than as a source for potential insights to understand reality and as a hypothesis for the beginning of analysis. Pyramiding assumptions to dictate conclusions should be at least as objectionable in law as building rickety structures of inferences on inferences to find facts. Conceptualizing economic analysis as one brand of thought among many and making that brand of thought the primary or sole goal of antitrust policy builds a dangerous inflexibility and blindness into the law. The Court invited these risks by adopting the neoclassical views of Professors Bork[11] and Posner[12] for not only determining what the law ought to be in analyzing vertical restraints, but also as the only basis for determining what reality ought to be used in the analysis.

The "rationality" assumption of both consumer and firm, the "efficiency" assumption of the functioning of perfectly competitive markets, and the existence of a competitive market in conformity with the models as the parameters of the reality of the dispute before the Court, and as expressions of the values that are permissible considerations for deciding the case, provides an airtight syllogism for deciding all cases in all categories of recognized per se violations despite the facts of any particular case. Justice White's concurrence[13] and the post-*Sylvania* comments of Professors Bork[14] and Posner,[15] which hoist the Court on the twin petards of its assumptions and methodology with regard to vertical price-fixing, serve to emphasize the consequences of adopting a narrow view of the purposes of the antitrust laws and an axiomatic method of deductive logic for implementing the law. Carried to its logical extreme, the Court's analysis may jeopardize all horizontal per se tests, absent a significant quantitative effect of a restraint that injures

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Restricted Distribution, Horizontal Merger and Potential Competition Decisions, 75 COLUM. L. REV. 282, 283 (1975), and Note, 88 HARV. L. REV. 636, 641 (1975)). It is impossible to assess the degree to which the Court assumed such speculation explains all reality, the reality of the case before the Court, or what "ought" to be the assumptions underlying what "ought" to be the legal standard governing vertical market restraints. In any event, it remains speculation and indicates a tendency to decide real cases by postulating hypothetical ones.

[11] Bork, *supra* note 5.

[12] Posner, *supra* note 5, at 283.

[13] 433 U.S. at 586.

[14] Bork, *Vertical Restraints:* Schwinn *Overruled*, 1977 SUP. CT. REV. 171 (1977).

[15] Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. CHI. L. REV. 1 (1977).

"consumer welfare."[16]

If one begins with the proposition that the sole goal of antitrust policy is to maximize "consumer welfare" as defined by the fixed models of one brand of economic theorizing and the imaginary workings of a perfectly competitive market, which only permit a minor premise on factual assumptions in accord with the models of the major premise but not necessarily in accord with unvarnished reality, the operations of deductive logic dictate the conclusion: Only those restraints that quantitatively displace the "market" and impair "consumer welfare" are unlawful under the antitrust laws because all others are either promoting "consumer welfare" or will be efficiently remedied by the functioning of the perfectly competitive market. Q.E.D. It is a conclusion, however, we cannot claim as true or false or right or wrong because the conclusion is assumed in the predicate.[17] It is the logical fallacy of affirming the consequent. If the factual and legal postulates of the syllogism are either not true or not true in all circumstances, then the worth of the conclusion is worthless or nearly so. If the facts of the dispute do not comport with assumptions of fact and value of the model governing the decision of the case, then the decision is also misleading. Exporting the result to determine the legality of other practices can only perpetuate and aggravate errors imbedded in the original analysis. For example, if the congressional purpose in adopting the antitrust laws is broader than the narrow goals assumed by Bork, Posner, and presumably the Court in *Sylvania*,[18] or if some or all of the factual assumptions underlying the economic model selected for analysis are inoperative, the analysis is one that confirms the model, rather than sensibly deals with the dispute and gives effect to congressional purposes. If Congress adopted the antitrust laws to maximize sensibly distributor and consumer freedom and choice as well as "consumer welfare" as defined by manufacturer self-interest, or if factors other than maximization of profits because of market imperfections motivated the manufacturer to impose vertical restraints, or if consumers were unable to maximize correctly utility in the context involved, an analysis that pretends otherwise generates a false and specious certainty in the law, does not decide justly the case before the Court, and frustrates goals of antitrust policy not admitted by the Court's model for decisionmaking. Sooner or later, a price must be paid because the law is failing to deal constructively and creatively with the opaqueness of an ever shifting and changing reality, the controversy before the Court, and the goals that the law is expected to achieve. While there may be comfort, and even a feeling of rectitude when the artificial assumptions of the model selected coincide with one's metaphysical biases of what ought to be, it is a comfort that comports neither with modern understandings of what legal analysis or economic analysis is or ought to be. To one schooled in jurisprudence, this analysis is also a return to nineteenth century legal positivism and the tunnel vision generated to the damage of both law and the society that law is designed to serve.[19]

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[16] Professor Bork has defined "consumer welfare" in a libertarian way by making the definition hinge on measuring economic performance and the scope of the law in terms of the impact of judicial intervention on the operations of the "market," rather than seeing the court's function as judging the validity of market intervention by private agreements in light of the goals of antitrust policy. He is allowed to offer this interpretation by virtue of the following definition: "'Competition' may be read as a shorthand expression, a term of art, designating any state of affairs in which consumer welfare cannot be increased by moving to an alternative state of affairs through judicial decree." R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 61 (1978). "Basic price theory" is made the "criteria" for courts to determine whether their intervention enhances "consumer welfare." *Id.* at 84. The concept of "consumer welfare," like the slogans "fair trade" and "right to work," has a popular and respectable ring to it but is not directly defined. It apparently is defined in terms of business "efficiency . . . lowering the costs of goods and services or . . . increasing the value of the product or service offered." *Id.* at 7. By definition, therefore, any judicial intervention not increasing "efficiency" is an inappropriate use of antitrust policy. Shifting the focus of analysis from evaluation of the "efficiency" enhancing and other consequences of private agreements that displace the competitive process, to the evaluation of whether judicial intervention enhances "efficiency" in terms of neoclassical price theory carries with it the implication that judicial intervention not meeting the criteria is anti "efficiency," useless, unwise or otherwise not appropriate under the antitrust laws. Moreover, attention is distracted from whether the private arrangement in question is efficient, not efficient, or neutral. The presumed existence of perfectly competitive markets—a presumption of rather large dimensions, questionable universality, and void of any reality in fact—apparently will serve to protect the public interest in all cases where judicial intervention does not increase "efficiency" or the private arrangement is not "efficiency" enhancing.

Although a useful line of speculation that calls attention to the factor of judicial intervention in the calculus of what antitrust policy "ought" to be, the gross factual and theoretical constraints on which the argument is built—as well as the epistemological and metaphysical assumptions one must make to use the analysis with confidence—make the argument a dangerous one that severely limits a process that is largely inductive and continuously confronted with sensibly resolving disputes arising in unvarnished reality. *See* Flynn, *supra* note 8. *Cf.* F. COHEN, THE ETHICAL BASIS OF LEGAL CRITICISM (1959) (arguing that every legal decision is an ethical one dependent on inductive reasoning). It is also an analysis that does not comport with the language of the statute or its purposes. Section 1 of the Sherman Act has not been amended to read: "Every judicial decision not enhancing consumer welfare is hereby declared to be unlawful."

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[17] Moreover, the predicate is a value choice inescapably premised on complex moral choices that cannot be ignored or buried beneath mechanical definitions of "efficiency," "consumer welfare," or "price theory" if intelligent discussion of what the law "ought" to be or not be is to take place. Felix Cohen has observed:

> An ethics, like a metaphysics, is no more certain and no less dangerous because it is unconsciously held. There are few judges, psychoanalysts, or economists today who do not begin a consideration of their typical problems with some formula designed to cause all moral ideals to disappear and to produce an issue purified for the procedure of positive empirical science. But the ideals have generally retired to hats from which later wonders will magically arise.

F. COHEN, *supra* note 16, at 3. *See also* Wiles, *Ideology, Methodology and Neoclassical Economics*, 2 J. POST KEYNESIAN ECONS. 155 (1979).

[18] This conclusion is difficult to avoid if one surveys the legislative history, what little there is of it, in an open minded fashion and not as an exercise in conforming history to one's view of what the law ought to be. *See* H. THORELLI, THE FEDERAL ANTITRUST POLICY—ORGANIZATION OF AN AMERICAN TRADITION (1955) (the most comprehensive attempt surveying the legislative history of the Sherman Act). Judicial decisionmaking in the context of a common-law process, particularly when implementing the purposes of fundamental, but vaguely stated policies founded in the Constitution and statutes like the Sherman Act, continually walks the fine line between pouring new wine into old bottles and breaking old bottles by attempting to get the old wine out or the new wine in. New insights and evolutions in reality must be accommodated to old values through the flexible process of the art of legal reasoning. The limits of the judicial function in relation to the legislative branch mean courts must not repeal or amend the old to conform to the new. It is a process requiring the flexibility of inductive reasoning, a generous understanding and appreciation of the past, the limits of the process, the function and functioning of the other branches of government, and a capacity for self-reflection and skepticism that one's model for reality or method for resolving some cases can resolve all cases.

The same criticisms may, of course, be made of *Schwinn*, in which the ancient rule against restraints on alienation became the universal talisman for determining legality and illegality for some vertical market restraints. The wooden application of the principle, divorced from its moral roots, current meaning, and practical consequences, soon generated dissatisfaction in the ranks of the decisionmakers.[20] Predictably, exceptions and exemptions quickly cropped up in the litigation because reality does not conform to a rule or model that artificially presupposes what reality is, ignores its complexity,[21] or becomes detached from the ends of the law and the complex process and concepts[22] by which the policies of the law are implemented in specific cases. Distorting or ignoring reality to serve the ends of a rule or model is no less dangerous than distorting the goals or purposes of a law to make the law conform to one's ideological fancy. In either case the certainty purchased is a false certainty. The public benefits claimed to result are an illusion. Lofty sounding values like promoting "efficiency" or "consumer welfare" may well turn out to be masks that hide the opposite result. Broader goals of the legal process also may be jeopardized since fairness, justice, and common sense become lost in such a mechanistic process.

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[19] Leff, *Economic Analysis of the Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 452 (1974).

[20] Much of the dissatisfaction is summarized in ABA Antitrust Section, Monograph No. 2, *Vertical Restrictions Limiting Intrabrand Competition* (1977), and some of which are noted in the *Sylvania* decision. 433 U.S. at 48, n.14.

[21] *See* Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

[22] *See* Simpson, *The Analysis of Legal Concepts*, 80 L.Q. REV. 535 (1964) (criticizing various attempts to explain the function and functioning of concepts in legal decisionmaking).

The analysis of Stewart and Roberts amply demonstrates the conclusion that *Schwinn* found too many activities conclusively unlawful and *Sylvania* held too many activities conclusively lawful. Their analysis of *Sylvania*'s logical implications for other rules of per se illegality is also both enlightening and persuasive. Yet, I am not persuaded of the wisdom of their conclusions as a means to escape the resulting quagmire or of the practical consequences of their specific proposals for realistic enforcement of the law to govern vertical market restraints. The quagmire has been generated by more serious difficulties than the mental sloppiness caused by an unseemly haste on the part of the Court to overrule *Schwinn*,[23] a failure to articulate standards for a rule of reason analysis of vertical restraints,[24] or an indulgence in gross factual assumptions like the magnitude of the "free-rider" problem in vertical restraint cases on a record that presents slight evidence of a "free-rider" problem or little specific evidence of any of the other speculative justifications for imposing vertical market restraints.[25] Those difficulties include an unstated misperception of the goals of antitrust policy and a breakdown in the appropriate methodology by which the Court should analyze cases that raise the question of whether to adopt a per se or rule of reason standard and how the standard adopted should be implemented for analyzing a particular category of restraints. The *Sylvania* opinion substituted axiomatic theological propositions for a reflective analysis of the reality of the dispute before the Court in light of the goals of the law. A mechanical deductive process of reasoning from fixed rules has been substituted for what ought to be a complex inductive and deductive process of legal analysis in light of the facts of the case and the goals of the law.

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[23] Most of the *Sylvania* opinion is devoted to the accumulation of a variety of policy reasons and factual speculation for overruling *Schwinn*. Aside from a general factual summary of Continental's claims at the beginning of the case, no detailed factual analysis of the case appears in the Court's opinion. While a reproduction of the record in the case is an inappropriate form of opinion writing, a general disregard of the facts and a failure to articulate why the Court concluded the facts justified a test of "reasonableness" in the particular case before the Court is an equally inappropriate form of decisionmaking. A fuller statement of the facts is found in the lower court opinion. 537 F.2d 980 (9th Cir. 1976), *aff'd*, 433 U.S. 36 (1977).

[24] One can trace the Court's failure to articulate standards for its rule of reason analysis to a number of factors including the case being tried under one theory of legality—illegality (the *Schwinn* rule), the court of appeals majority deciding the case by legaily defining the conduct as not falling within the category of per se illegality that the lower court jury instructions were based on, and the Supreme Court affirming the court of appeals' reversal and remand for further proceedings on grounds that the category of per se illegality the court of appeals found irrelevant and the trial court found relevant is no longer a category of per se analysis for all vertical nonprice restraints. The opinions pass like ships in the night without grappling with each other. While these observations may undercut slightly the criticisms of note 23 *supra*, they make speculation about the implications of the Court's mental process in *Sylvania* for other per se categories risky at best. The peculiar posture of the case, in light of its prior treatment by lower courts, may have contributed to the Court's failure to articulate what factors and facts are relevant to a rule of reason analysis on remand and presumably other cases involving similar restraints.

III. THE GOALS OF ANTITRUST LAW

Sylvania left unclear the goals or purposes the Court believes antitrust enforcement achieves, although the majority clearly appeared to emphasize the primacy of what are loosely called "economic" goals. The majority in *Sylvania* noted: "Competitive economies have social and political as well as economic advantages . . . but an antitrust policy divorced from market considerations would lack any objective benchmarks."[26] A court that believes refuge in "economic analysis" rescues it from moral, political, and social considerations obviously has not thought deeply, or does not wish to, about the nature of the legal process. Such a court is likely to integrate legal analysis and "economic analysis" by disregarding "legal analysis," rather than making economic insights subservient to the goals of the legal process. Moreover, the implication that there are those who advocate divorcing antitrust policy from economic concerns was neither supported by any references, nor is it likely that the implication could be supported.

The inference that economic analysis provides "objective benchmarks," while political or social concerns do not, is clearly untenable on a number of grounds. I have discussed elsewhere the questionable "objectivity" of "economic analysis."[27] The assumption is a superficial one perhaps induced by claims that "economic analysis" is empirically based, mathematically rigorous, and logically coherent.[28] Research and speculation in other social sciences, as well as astrology and numerology, purport also to be empirical, mathematically rigorous, and logically coherent. One should not be seduced to believe, however, that because we gain limited and transitory insights into some aspects of reality that we have all "truth" or that the limited "truth" that we do perceive is enduring, perpetual, and universal. Dressing the analysis in the raiments of mathematics, deductive logic, and coherence is no guarantee of the truth of the conclusions. Law should not rest its judgments on the flimsy foundations of superficial efforts to be a "science."[29]

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[25] This criticism is analogous to the problem in tort litigation of deciding particular cases through analysis of hypothetical cases not before the court. *See* Thode, *The Indefensible Use of the Hypothetical Case to Determine Cause In Fact*, 46 TEX. L. REV. 423 (1968). The possibility that certain vertical restraints may enhance interbrand competition in some circumstances does not mean they will do so in all circumstances. Nor does the possibility necessarily justify a conclusion that the restraint should be lawful in those circumstances where interbrand competition is likely to be enhanced. The latter determination is one of policy, not logic, and one that requires an articulation of the goals of the law in light of the particular circumstances of the case.

[26] 433 U.S. at 53. *See also* note 23 *supra*.

The post-*Sylvania* speculations in the courts and academia purporting to be based on "objective benchmarks" of "market considerations," have spawned a multiplicity of conflicting decisions and proposals supported by extensive factual speculation not based on any particular objective study other than unverified assumptions of fact and value underlying the proponent's analysis. One should not be surprised by the chaos because an antitrust decision divorced from a deeper understanding of the social, political, and economic goals of the law and a due humility for the complexity of reality cannot avoid generating confusion. The chaos results because facts are detached from consequences, inductive reasoning is suppressed by an excessive reliance on deductive reasoning, and reality refuses to bow down to the syllogism. Stewart and Roberts rightly challenge, but do not fully explore, the merits of some of the assumptions made by proponents of a per se legality rule for all vertical market restraints.[30] For example, why should a conclusive presumption be given a supplier's perception of the most efficient way to distribute its product when that decision is implemented by restricting or displacing the decision of independent distributors and consumers? Why is "efficiency" and "consumer welfare" measured only in terms of supplier self-interest? A response predicated solely on models of a particular school of price theory or pure competition is not enough. We all know that both models are figments of the imagination and premised on a set of narrow and rigid normative assumptions that do not equate with reality while ignoring other factors of legal significance that often seem to be at work in disputes worthy of litigation.[31]

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[27] *See* Flynn, *supra* note 8, at —. For a more elaborate analysis of the "objectivity" of neoclassical analysis, see M. Hollis & E. Nell, Rational Economic Man (1975); Wiles, *supra* note 16.

[28] *See* E. Schumacher, Small Is Beautiful: Economics As If People Mattered (1973) (an example of a humanistic approach to economics and a rejection of a quantitative and mathematically based analysis). The empirically based, mathematically rigorous, and logically coherent economic analysis of the post-Keynesians offers fundamentally different "objective" standards to guide policy. *See* A Guide To Post Keynesian Economics (A. Eichner ed. 1980). Post-Keynesian analysis also appears more persuasive in light of current circumstances. *See* Heilbroner, *A Guide to Post-Keynesian Economics*, The New York Review of Books, Feb. 21, 1980, at 19, col. 1.

[29] *Cf.* Cahn, *Jurisprudence*, 30 N.Y.U.L. Rev. 150 (1955) (criticizing claims that the Supreme Court's findings in the desegration decisions were "scientifically" based). Theodore Roszak observed in his introduction to E. Schumacher, *supra* note 28, at 8:

> The great majority of economists' Scnumacher laments, "are still pursuing the absurd ideal of making their 'science' as scientific and precise as physics, as if there were no qualitative difference between mindless atoms and men made in the image of God." He reminds us that economics has only become scientific by becoming statistical. But at the bottom of its statistics, sunk well out of sight, are so many sweeping assumptions about people like you and me—about our needs and motivations and the purpose we have given our lives. Again and again Schumacher insists that economics as it is practiced today . . . is a "derived body of thought." It is derived from dubious, "meta-economic" preconceptions regarding man and nature that are never questioned, that dare not be questioned if economic science is to be the science it purports to be rather than (as it should be) a humanistic social wisdom that trusts to experienced intuition, plays by ear and risks a moral exhortation or two.

See also Dewey, *The Economic Theory of Antitrust: Science or Religion?*, 50 Va. L. Rev. 413 (1964).

One must begin with an understanding of the goals of the law, the subservient role of economic and other analysis in the process, and a sophisticated understanding of the methodology of the legal process in order to reach principled, yet pragmatic, conclusions. Precedent will be a useful guide, yet not a barrier to dealing with the facts of subsequent cases. Analytical symmetry should be a feature of our understanding of the law, yet neither its only goal nor its false god. Legal analysis is an art, not a science. It requires judges to make judgments in light of the policies of the law, rather than merely apply syllogisms to facts served up for decision.

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[30] Stewart & Roberts, *supra* note 4, at 742.

[31] An imbalance of bargaining power between buyer and seller is frequently one factor inherent in vertical market restraints, but usually ignored by "economic analysis." For an interesting analysis of vertical restraints taking account of an imbalance in bargaining power, see Goldberg, *supra* note 4. Another factor not accounted for by "economic analysis" is the integral function of time in the analysis. Deciphering short and long term consequences of conduct cannot be done sensibly if time is ignored in the calculus. *See* J. HICKS, CAUSALITY IN ECONOMICS 37-38 (1979). A belief to the contrary is the equivalent of assuming that micro- and macroeconomic theorizing can be connected sensibly by the indiscrete summation of individual supply and demand curves.

The general purpose of the antitrust laws is to protect and maintain the competitive process from unreasonable displacement by contracts, combinations, and conspiracies[32] or by the unreasonable exercise or possession of monopoly power.[33] This general purpose is designed to serve social, political, and economic goals. Even those who believe that the goals of the law are purely "economic," cannot escape moral, political, and social considerations in making that choice, giving it meaning, or applying the choice to factual controversies. The policies, however, behind choosing the competitive process as our fundamental method for governing economic activity in the private sphere always have been viewed as achieving goals broader than a materialistic measure of economic "efficiency." Those goals are limited not only to the narrowly defined and peculiar concepts of maximization of "efficiency" and "consumer welfare," but also include, *inter alia*, the goals of insuring that individual entrepreneurs succeed or fail on the competitive merits and not by the dictates or conspiracies of others who unreasonably displace the competitive process,[34] maximizing intelligent consumer choice, dispersing undue economic power, and subjecting private power to the discipline of the competitive process in place of affirmative government regulation.[35] They are goals whose meanings are not

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> [32] It is the "contract, combination . . . or conspiracy, in restraint of trade or commerce" which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other. . . . And the amount of interstate or foreign trade involved is not material . . . since § 1 of the Act brands as illegal the character of the restraint and not the amount of commerce affected.

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224, n.59 (1940).

> [33] [T]here can be no doubt that the vice of restrictive contracts and of monopoly is really one, it is the denial to commerce of the supposed protection of competition. To repeat, if the earlier stages are proscribed, when they are parts of a plan, the mere projecting of which condemns them unconditionally, the realization of the plan itself must also be proscribed.

United States v. Aluminum Co. of Am., 148 F.2d 416, 428 (2d Cir. 1945).

[34] *See* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959); Rahl, *Per Se Rules and Boycotts Under the Sherman Act: Some Reflections on the* Klor's *Case*, 45 VA. L. REV. 1165 (1959).

[35] *See* Blake & Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422 (1965); Leff, *supra* note 19; Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979); Schwartz, *On the Uses of Economics: A Review of the Antitrust Treatises*, 128 U. PA. L. REV. 244 (1979); Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 U. PA. L. REV. 1076 (1979); Sullivan, *Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships*, 68 CALIF. L. REV. 1 (1980); Sullivan, *Economics and More Humanistic Disciplines:*

frozen by values or conditions of the seventeenth century any more than the conditions or the constraints of the eighteenth century froze the meaning of the commerce clause and the first amendment.

Since the beginning of judicial experience with the Sherman Act, it has been recognized that all contracts and many unilateral actions by those engaged in trade literally restrain trade.[36] The words of the statute, literally applied, appeared to require legal condemnation of every activity having the prohibited effect of restraining trade. The dilemma created has required the discovery of a principled and predictable methodology for sorting out joint and unilateral conduct restraining trade which "ought" to be found unlawful from conduct which "ought" not to be unlawful. Courts and commentators have resorted to the ancillary/nonancillary distinction,[37] per se and rule of reason analysis,[38] and the "gumball machine methodology" of using artificial economic models as the major premise of a rigid deductive syllogism to dictate conclusions without much regard to the facts of particular cases.[39] In the instance of gumball machine analysis, logic may provide the springboard of the analysis, but it does not guarantee the success of the dive or the eternal and general verity of the models made the premise of the analysis. Reality often does not conform to the assumptions of the models. The goals the law seeks to achieve are broader than those permitted by the model. The process through which law is implemented and the environment in which it is done imposes constraints

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What Are the Sources of Wisdom For Antitrust?, 125 U. PA. L. REV. 1214 (1977) (surveys of the goals of antitrust policy).

[36] See United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 327 (1897). In Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918), Justice Brandeis observed:

> The case was rested upon the bald proposition, that a rule or agreement by which men occupying positions of strength in any branch of trade, fixed prices at which they would buy or sell during an important part of the business day, is an illegal restraint of trade under the Anti-Trust Law. But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence.

Id. See also Standard Oil Co. v. United States, 221 U.S. 1, 63-70 (1911).

[37] United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *modified*, 175 U.S. 211 (1899).

[38] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 (1940); Allison, *Ambiguous Price Fixing and the Sherman Act: Simplistic Labels or Unavoidable Analysis?*, 16 HOUS. L. REV. 761 (1979). The Court's most recent analysis of the per se—rule of reason dichotomy is found in National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978).

[39] Flynn, *supra* note 8, at —.

and responsibilities beyond those permitted by the methodology of economic analysis.

Whichever methodology the courts have followed never seems to work well for an extended period of time or provide a basis for deciding all types of cases. For example, courts have held a restraint to be a per se unlawful restraint in one circumstance and a lawful restraint in other circumstances.[40] As Stewart and Roberts so ably demonstrate, reliance on a strictly neoclassical analysis of the problem of vertical restraints to the exclusion of all other considerations appears to sanction too many forms of conduct in conflict with antitrust goals. The dilemma, in part, is one of articulating policy goals achieved through preserving a competitive process as the rule of trade and finding a methodology that permits a reasoned, efficient, and practical assessment of the factual implications of specific marketing practices in light of the goals identified and in the context of the legal process. The chosen methodology must be one that is sufficiently flexible to account for facts unique to the dispute, while balancing in a reasoned way the competing goals of the law involved. The methodology also must be a knowable methodology and produce predictable standards, which can induce one to recognize like circumstances and be guided accordingly in compliance with the law. The methodology also must be one capable of application in a like manner to like circumstances in subsequent cases factually dissimilar. Neither *Schwinn* nor *Sylvania* meet these criteria and thus the confusion and debate that follow both decisions.

Stewart and Roberts' analysis does not satisfy these criteria either. They did not approach the problem in the aforementioned manner. It is not fair to criticize the Authors for failing to follow the criteria because they performed a different task. Nevertheless, they have not identified the goals of antitrust policy involved in vertical restraints other than expressing the generality that antitrust laws are designed to "promote competition and the free market system" and accordingly must "pay deference to economic analysis and reality."[41] But what is "competition," "the free market system," "economic analysis," and "reality"? When is deference "due" and "undue"? Stewart and Roberts never clearly define these concepts or assess the "dueness" of the deference to them. Although their concept of "economic analysis" is apparently the neoclassical paradigm, their concept of "reality" indicates a belief that factual conditions for operation of the paradigm do not always or even generally exist. If this is true, pretending otherwise necessarily will not achieve the pre-defined "maximization of consumer welfare" or "efficiency" because we must vary some of the variables of the model. And, as Arthur Leff has irreverently pointed out with regard to this kind of thinking: "[I]f you think you know what [will] happen when you vary [one of] your variables, you're a booby."[42]

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[40] Van Cise, *The Future of Per Se In Antitrust Law*, 50 VA. L. REV. 1165 (1964). For a more recent analysis of the disregard of per se rules, see Redlich, *The Burger Court and the Per Se Rule*, 44 ALB. L. REV. 1 (1979).

[41] Stewart & Roberts, *supra* n.4, at 749.

Because I begin with a belief that antitrust policy was intended to concern itself with a broader range of goals than those admitted directly by the neoclassical model and cannot avoid doing so, I believe that it is necessary to proceed beyond the analysis of other vertical per se restraints than those offered by Stewart and Roberts. The impact of the restraint on consumer freedom to maximize choice and the freedom of distributors to maximize their choice and efficiencies must enter the calculus along with "efficiency," the "free market system," "economic analysis," "reality," and the other goals of the law. The proposition that supplier self-interest is a sufficient surrogate for these interests and a reliable indicator of the facts of a case assumes too much about the perfect functioning of the market and the coincidence of reality before the court with the assumptions of the model. The proposition also ignores a tradition of antitrust law in according weight to the values of maximizing consumer choice and the independence of distributors freely to act in their own self-interest for political and social reasons as well as economic ones. The establishment of a sensible and desirable balance among these often competing and conflicting goals within the context of a bewildering array of potential factual circumstances cannot be achieved by mechanical invocation of artificial economic models or venerable legalisms from another age. A flexible, but structured, methodology is required. The relative weight of the competing goals of antitrust policy raised by vertical market restraints, the facts of the case, and the qualitative effect of the category of restraint involved on the ideal of a competitive process as the rule of trade must all be weighed sensitively, efficiently, and inductively by the legal process.

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[42] Leff, *supra* note 19, at 476.

IV. METHODOLOGY OF ANALYSIS

I have argued elsewhere that recent antitrust litigation has generated substantial confusion by the failure to pay much attention to the *way* cases are analyzed or the method of analysis that "ought" to be followed in resolving antitrust disputes.[43] Most of the attention is focused on *what* is decided and the merit or demerit of specific substantive conclusions on economic, political, social, or other grounds. The *way* cases are decided is at least as significant as *what* is decided because methodology determines the range of the permissible legal and factual inquiry, the degree of flexibility in the relevance and meaning of principles found applicable, and the intellectual portability of the analysis from one case to another and one category of conduct to another. Little or no attention is paid to the Court's method of analysis by those seeking to explore the implications of the *Schwinn* and *Sylvania* decisions for vertical market restraints and other per se rules of illegality. Rather, the category by category proponents of ad hoc substantive rules of legality or illegality invite a comparison of resulting antitrust standards to the Internal Revenue Code and other undesirable monuments to the methodology of legal positivism and the folly of man in placing too much trust in concepts and language to control the complexities of reality, express the goals of the law, and dictate legal decisions in future cases.[44]

The primary source of the difficulty is the conceptualization of per se and rule of reason analysis as two separate tracks of analysis. Each line of analysis allegedly follows clearly understandable substantive rules that are applied mechanically and deductively to the knowable facts of a dispute. It is a difficulty that characterizes the methodology of both *Schwinn* and *Sylvania*, where a rule-oriented mentality is carried too far and generates future confusion and complexity without settling the dispute before the Court or the general policy to be applied in other cases. Unfortunately, the relevance and meaning of rules continually shift in light of the facts of the dispute. In addition, the facts of disputes worthy of litigation do not seem willing to conform to the fixed meaning and objectives of the rules of *Schwinn* and *Sylvania* or the economic models underlying the analysis for a deductive process to work routinely. The frictionless application of a fixed rule to mechanically produced facts replicating previous experiments can never take place because the rule is not fixed and the facts of disputes never match the assumptions of the model underlying the rule or the reality of prior cases. The reasoning process is more inductive than deductive, with the relevance, meaning, and application of rules each requiring a complex and dynamic thinking process beyond the capacity of a "gumball machine methodology" of analysis.

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[43] Remarks delivered to the Sherman Act Subcommittee of Antitrust Section of The American Bar Association, by J. Flynn, *Rethinking Sherman Act Analysis: Three Proposals For Reducing the Chaos*, in Honolulu, Hawaii (August 5, 1980).

[44] The insights of Dean Leon Green are particularly apt when considering the methodology of *Schwinn* and *Sylvania*:

> No natural or social science has found its secrets in words and phrases and neither will the science of law. . . . There is no such thing as words so plain that they are not to be interpreted. There are no premises to be found so certain that nothing more than an irrefutable logic is required. . . . A process which assumes the very ends it is employed to discover will in the end betray its futility. . . . The attempt has been made and is still made to make language do the service of judging itself. There can be no such substitution. Words are the machinery by which the power of thought is handled, but if there is no such power put into them the words are lifeless. In the administration of law, both the judge who surrenders this power to phrases as well as the judge who spends his time attempting to pattern phrases to control succeeding judges in the cases to come, can only do his science ill. . . . There is no warrant for the fear that a fluid language and adjustable rules are undependable. We have never had any other sort, although we have lost much by not recognizing that fact. The point is we have looked to the wrong source for dependability. We have sought it through a technic of language instead of a technic of judging. We rather trust the machinery than its engineers.

Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1018-19 (1928).

Courts usually are confronted with questions of an inductive nature at any one or more of at least four points in antitrust litigation under section 1 of the Sherman Act: 1) Whether the evidence is sufficient to infer there is a "contract," "combination," or "conspiracy" within the meaning of the antitrust laws?;[45] 2) whether the facts "ought" to induce the conclusion that joint action "ought" to be presumptively unlawful[46] or whether it is within or without a recognized category of presumptively illegal conduct?;[47] 3) what evidence rebutting the presumption of illegality or establishing a justification for the restraint

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[45] *Compare* Interstate Circuit, Inc. v. United States, 306 U.S. 208, 221 (1939) (conspiracy inferred from coerced parallel behavior) *with* Theatre Enterprises v. Paramount Film Distributing Corp., 346 U.S. 537, 540-41 (1954) (parallel behavior standing alone is not a conspiracy). *See also* Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962); Note, *Intra-Enterprise Conspiracy Under Section 2 of the Sherman Act: A Suggested Standard*, 75 MICH. L. REV. 717 (1977).

[46] See Redlich, *supra* note 40 for a recent survey of the adoption and evolution of per se rules.

[47] United States v. Container Corp., 393 U.S. 333 (1969); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); Allison, *supra* note 38. The remedy sought in a case also may vary the standard of proof of the category of conduct labelled per se unlawful. *See* United States v. United States Gypsum Co., 438 U.S. 422 (1978); Garvey, *The Sherman Act and the Vicious Will:*

"ought" to be either relevant or admissible in light of the facts and circumstances of the case and the policies of the law?;[48] and, 4) if the evidence does not justify inducing the conclusion that the conduct is within a recognized category of per se illegality, what factors "ought" to be relevant and how should they be weighed in determining the reasonableness or unreasonableness of the restraint?[49] None of these questions can be analyzed sensibly without a clear understanding of the goals of the antitrust laws, the interrelationship of those goals in light of the characteristics of the dispute, and the limitations and methodology of the legal process in effectuating its function of implementing the goals of the law, deciding the case before the Court, and providing guidance for resolution of similar disputes in the future. The process by which any one of the four questions is decided may require an extended evidentiary inductive inquiry into purpose, effect, benefits, detriments, horizontal or vertical nature of the restraint, power of the participants, and/or unique characteristics of the activity or the industry in which the activity occurs.[50] Moreover, the subtle interplay

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Developing Standards For Criminal Intent in Sherman Act Prosecutions, 29 CATH. L. REV. 389 (1980).

[48] *Compare* Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979) (joint licensing of copyrights not per se illegal price-fixing) *with* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978) (joint limitation of bidding competition per se illegal price-fixing). The lower court confusion in Catalano, Inc. v. Target Sales, Inc., 100 S. Ct. 1925 (1980), a case raising the issue of whether a conspiratorial elimination of short-term credit was horizontal price-fixing, appeared to stem from the Supreme Court's failure to articulate standards for distinguishing per se price-fixing from rule of reason price-fixing in *Broadcast Music* and *Professional Engineers*.

[49] National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978); United States v. Topco Assocs., 405 U.S. 596 (1972); Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918); Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). The analysis of boycott cases frequently presents an issue of whether the conduct is a boycott within the meaning of that antitrust concept or, even if it is a boycott, whether it is a boycott warranting per se condemnation because of other factors or values deemed relevant. *See* Missouri v. NOW, Inc., 620 F.2d 1301 (8th Cir.), *cert. denied*, 49 U.S.L.W. 3216 (U.S. Oct. 7, 1980) (No. 79-2037); Comment, *Protest Boycotts Under the Sherman Act*, 128 U. PA. L. REV. 1131 (1980). Adoption of Professor Bork's definition of competition as the predicate of antitrust analysis of boycott cases, see discussion *supra* note 16, would result in overruling cases like *Klor's* because judicial intervention does not appear to enhance "consumer welfare." The fact that a conspiratorial displacement of the competitive process did not enhance "consumer welfare" and excluded the plaintiff from business apparently would be irrelevant under Professor Bork's rationale. His discussion of the boycott and individual refusals to deal cases does not reach these conclusions. Indeed, it is difficult to comprehend what policy conclusions Bork advocates in these areas other than the generality that all refusals to deal ought not be per se unlawful. *See* R. BORK, THE ANTITRUST PARADOX 330-46 (1978).

[50] *See* L. SCHWARTZ & J. FLYNN, ANTITRUST AND REGULATORY ALTERNATIVES 467 (5th ed. 1977) (factors generally involved in a rule of reason analysis).

among each of these questions in the process of analysis may confuse the analysis because doubt or certainty about one question (the existence of a "contract" for example) may tempt a court to manipulate the factors necessary to answer one of the other questions.[51]

In order to expose these kinds of issues to rational analysis, the per se—rule of reason dichotomy should be recognized as a single evidentiary methodology establishing burdens of proof of varying levels of conclusiveness and nonconclusiveness to determine whether there has been an unreasonable displacement of the competitive process. The dichotomy should not be viewed as separate sets of rules and sub-rules to dictate conclusions irrespective of the facts.[52] Conduct that clearly displaces, in a qualitative sense,[53] goals that the competitive process seeks to achieve or maintain is condemned on a presumptively, or nearly presumptively, conclusive basis. Whether the conduct invokes the presumption, and the degree to which it is conclusive or not, depends on the facts of the case in light of the policies of the law. For example, any type of conspiratorial price-fixing, whether it is maximum, minimum, horizontal, or vertical, clearly displaces the competitive process. Its qualitative effect on the ideal of a competitive process establishing price, allocating resources, and other goals of the law, warrants condemnation in all but the most rare or unique circumstances.[54] Price-fixing is a tampering with the "central nervous system of the economy"[55] and an assumption of power we have conceded only to a democratically elected government[56] and in circumstances requiring affirmative regulation.

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[51] *See* Kaplan v. Burroughs Corp., 611 F.2d 286 (9th Cir. 1979), *cert. denied*, — U.S. —, 100 S. Ct. 3016 (1980); Oreck Corp. v. Whirlpool Corp., 579 F.2d 126 (2d Cir.), *cert. denied*, 439 U.S. 946 (1978); Eastern Scientific Co. v. Wild Heerbrug Instrs., Inc., 572 F.2d 883 (1st Cir.), *cert. denied*, 439 U.S. 833 (1978); Borger v. Yamaha Int'l Corp., [1980-2] Trade Cas. (CCH) ¶ 63,373 (2d Cir.).

[52] For a more elaborate explanation of the significance of conceptualizing the rule of reason—per se dichotomy as a single method of analysis that establishes burdens of proof of varying levels, see Flynn, *supra* note 43. The idea is not a new one. *See* Van Cise, *supra* note 40. Several scholars, including Professors Stewart and Roberts, are gravitating to this view in the context of vertical market restraints. *See* Bohling, *supra* note 4; Pitofsky, *supra* note 4; Zelek, Stern & Dunfee, *supra* note 4. It is appropriate to apply this methodology to the analysis of all cases arising under section 1 of the Sherman Act. While many cases, particularly the ones not litigated, will involve a nearly conclusive presumption of legality or illegality, those cases worthy of litigation because ambiguity over some element of the offense will be analyzed more sensibly if this methodology is adopted. While difficult policy choices will not be resolved by this analysis, they will not be ignored or confused as under the present methodology of the courts. Recognizable circumstances that trigger the inference of the necessary joint action category of per se conduct, level of and permissible evidence of rebuttability or justification, and standards of unreasonableness will evolve gradually. A reconsideration of existing precedent in light of this methodology makes clear that this approach is one most courts have been in fact following even though courts have not expressly identified the methodology. Some decisions appear to have no methodology of decisionmaking in mind other than finding a rationale for denying plaintiffs a trial of their claims. *See supra* note 51.

[53] The "qualitative"/"quantitative" distinction is a traditional one in antitrust analysis. *See* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Standard Oil Co. v. United States, 337 U.S. 293 (1949); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). Consideration of quantitative factors, power of the defendant, or structure of the industry, may be relevant, but subsidiary considerations in whether to draw the inference of conspiracy or whether it is a conspiracy to engage in presumptively unlawful conduct. *See* United States v. Container Corp., 393 U.S. 333 (1969); Associated Press v. United States, 326 U.S. 1 (1945); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

The evidentiary presumption of illegality is a means to sort out the facts of the dispute in the process of determining whether the goals of the law have been violated. The quantitative impact of the conduct is irrelevant in view of the centrality of our moral commitment to the competitive process as the rule of trade if it is shown that joint action that amounts to a contract, combination, or conspiracy has displaced that process in purpose or effect. The statute outlaws an unreasonable "restraint of trade," not the restraint of all or most trade. While market structures and power of the participants may be relevant in some cases to aid in determining whether to infer the existence of an agreement or the category of restraint, the basic inquiry is a qualitative one in light of the goals of the law and not a quantitative one in light of the amount of trade impaired.[57] While the fairness implications of the sanctions imposed for such conduct may justify the requirement of proving purpose and effect in the case of criminal sanctions,[58] the fundamental duty imposed by law is one of not displacing the competitive process and its goals. Whether the facts of a particular case "ought" to be found a violation of the statute cannot be decided by the verbalization of rules divorced from the facts. It is the paradox of legal reasoning that one must know the facts to determine what rules are relevant and know what rules are relevant to determine what facts are relevant. The recognition of legal reasoning as both inductive and deductive is the first step out of the paradox. The refusal to permit theological dogmas to control the thinking process is the second step. A due appreciation for the complexity of the goals of the law and the influence of facts in determining the relevance, meaning, and applicability of concepts and rules is the third step. Finally, the unravelling of the paradox is a matter of artistic skill and mastery of the legal process and its peculiar logic.

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[54] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940).

[55] *Id.*

[56] *See* Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941). In some circumstances when regulatory powers have been delegated to quasi-private institutions, antitrust policy has been relied on to extend due process constraints on exercises of governmental powers to the private institution. *See* Silver v. New York Stock Exch., 373 U.S. 341 (1963).

[57] *See* note 53 *supra.*

[58] *See* note 47 *supra.*

Experience, the teachings of economics and other sources of knowledge, and the political and social goals of the antitrust laws justify similar presumptively unlawful treatment of horizontal contracts, combinations or conspiracies to boycott, to divide territories, or to divide customers. The qualitative effect of such conduct on price, resource allocation, independence of traders, freedom of consumers, and allocation of power in society is usually so pronounced that condemnation is warranted except in the most unusual circumstances. Evidentiary presumptions of illegality on a nearly conclusive basis are justified once the conduct is identified. On occasion, even this most fundamental set of principles must yield to the unique circumstances of a particular case.[59] The rigor of their implications also may necessitate modification of the presumption by manipulating the concept of contract or conspiracy or the meaning of a particular per se category to avoid impractical or unjust results in certain factual circumstances.[60]

When the conduct is vertical in nature, values and goals behind the policy of governing our economic affairs by a competitive process also can be threatened; particularly intrabrand price competition, rights of competing sellers, freedom of traders, and freedom of consumers where the market is less than perfectly competitive. At the same time, however, vertical restraints also may promote, in some circumstances, interbrand competition, increase the efficiency and ability of traders to compete, and enhance the consumer's ability to choose or to receive all the benefits of the choice made. The dilemma usually is one of finding a principled, yet flexible, process for sensibly sorting out the laudable from the odious or unnecessary within the context of a specific case. Fixed rules dictating consequences are not helpful in such circumstances. Elaborate constructs of rules of the type proposed by Stewart and Roberts are neither helpful nor necessary. A more sensitive reform could be adopted to avoid the unnecessary complexity and practical difficulties of the Stewart and Roberts' rules that emphasize a quantitative test for what is primarily a qualitative inquiry.

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[59] *See, e.g.,* Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979); Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933); Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, Inc., 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970); Deesen v. Professional Golfers' Ass'n, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966); Molenas v. National Basketball Ass'n, 190 F. Supp. 241 (S.D.N.Y. 1961); United States v. National Football League, 116 F. Supp. 319 (E.D. Pa. 1953).

[60] *See* United States v. Morgan, 118 F. Supp. 621 (S.D.N.Y. 1953) (combination of investment bankers syndicating new securities issue at a fixed price held a joint venture). A similar line of analysis should have been considered in Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979).

The treatment of per se rules and rule of reason analysis as a methodology that creates evidentiary presumptions, rather than fixed and rigid rules, offers a means for sensibly sorting out circumstances where conduct should be permitted and where it should be condemned. Lesser levels of presumptive illegality, and in some circumstances no presumption of illegality or an affirmative burden of overcoming a presumption of legality, need to be developed in these circumstances. Indeed a realistic appraisal of the Court's application of the per se and rule of reason analysis in past cases suggests this is the course courts have implicitly taken in other areas of antitrust analysis. Stewart and Roberts verbalize some of their tests in a similar manner,[61] but do not quite abandon a rule-oriented approach and link most of their tests to a quantitative measurement of market power and/or market structure.

Because of the conduct's impact on trader and consumer freedom and the lessening of intrabrand competition, a presumption of illegality, without regard to market power or structure, is warranted as a beginning guidepost to analysis when the conduct is a product of a vertical contract, combination, or conspiracy explicitly imposing resale price maintenance on territorial or customer divisions. The test is a beginning guidepost because it is uncertain whether the facts will raise the inference that the conduct results from a contract or conspiracy or is within the per se category. It is not certain whether a justification or excuse for the conduct is factually present in the case or warranted as a matter of policy under all the circumstances unique to the dispute. Moreover, the test is a qualitative one because the legal essence of the offense under section 1 is contractual or conspiratorial conduct that unreasonably displaces the competitive process. The inquiry is a qualitative one not dependent on the amount of commerce displaced or even that any commerce is displaced. The Authors' attempt to make the primary focus of a section 1 analysis of vertical market tests a measure of quantitative market displacement not only greatly complicates the trial of such cases and converts the analysis into a section 2 inquiry, but also would require the reversal of substantial and significant long standing legal precedent to the contrary.[62]

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[61] Stewart & Roberts, *supra* note 4, at 758.

Before that additional chaos is brought on to comply with the implications of *Sylvania*, other means for sensibly moderating the overly broad implications of both *Schwinn* and *Sylvania* should be explored. The conceptualization of the per se and rule of reason methodology as a series of evidentiary presumptions of varying levels of rebuttability is a more convincing path to follow. The moderately presumptive illegal classification of contractual air-tight vertical restraints as to price, customers, and territories makes good sense. It provides a method for sorting out the conduct in question in light of the goals of the law. The presumption, however, may be rebutted when the conduct is motivated by a good business justification in accord with the goals of the law, *i.e.*, proof of an objective need to provide significant point of sales services, efficiently market a product, gain entry into a market, or protect public health or safety in light of peculiar risks associated with the product. The restraint, however, should be ancillary to these otherwise lawful objectives and no more restrictive than objectively necessary to overcome the presumption of illegality—questions of fact that must be resolved in the circumstances of the restraint and peculiarities of the business.

I have difficulties with several of the remaining standards proposed by Stewart and Roberts with regard to other categories of vertical restraints. Aside from my skepticism with whether we yet have enough "stuff" to presume some of them lawful, unlawful, or subject to "careful scrutiny," many vertical restraints may not involve the requisite contract, combination, or conspiracy for a section 1 violation.[63] I think other proposals, like the exception to a per se "rule" for horizontal restraints allocating territories based on "smallness" of the competitors,[64] contain no objective benchmark for the exception or appreciation for the legal essence of the offense. These proposals might be better analyzed under joint venture principles or an evidentiary presumption of illegality, which permits joint buying in some circumstances but not division of customers and territories.[65] I would not dismiss casually a per se illegal evidentiary presumption against vertical maximum price-fixing, with claims of "never justified" or "absurd."[66] Vertical maximum price restraints are not only a rare practice, but also are associated mainly with a monopolist's division of customers and territories. In *Albrecht v. Herald Co.*,[67] the leading case in which the question was presented, the issue should not have been analyzed as a problem arising under section 1, but one arising under section 2 of the Act.[68] In light of my perceptions of the goals of the Sherman Act impinged by the conduct and the factual context in which vertical maximum price-fixing arises, I would be hesitant to conclude that a presumption of

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[62] Quantitative factors may in some circumstances aid in the determination of the qualitative issues. *See* note 53 *supra*.

[63] Unilateral refusals to deal, to enforce suggested prices in the absence of a monopolistic purpose or effect, and unilateral territorial limitations or customer restraints do not violate section 1 of the Act. United States v. Colgate & Co., 250 U.S. 300, 307 (1919). While subsequent cases may have limited significantly the *Colgate* doctrine, *see, e.g.*, United States v. Parke, Davis & Co., 362 U.S. 29, 36-47 (1960); Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226-27 (1939), the extended evidentiary inquiry in cases where the element of conspiracy is in question is a vehicle whereby courts determine whether the conduct unreasonably restrains trade as well as determines

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the legal presence of an agreement. While the purely economic consequences of a coercive refusal to deal may be identical to the conspiratorial arrangement to achieve the same ends, the legal consequences are not the same because the law has chosen to outlaw one means to the end but not the other. Because the law's objectives are broader and more complex than under a purely economic approach, it does not constitute a paradox for the legal system to select a different basis for determining illegality (a "contract," "combination," or "conspiracy") from the basis used by a school of economic analysis ("efficiency" or "consumer welfare") to determine what conduct should be allowed.

[64] Stewart & Roberts, *supra* note 4, at 760.

[65] In United States v. Topco Assocs., Inc., 405 U.S. 596 (1972), the combination may have started out as a relatively small one of geographically dispersed local grocery chains engaging in joint buying and private label marketing, but the combination did not remain relatively small or limited to joint buying. By the time *Topco* was tried, joint sales of the chains amounted to $2.3 billion and the member chains possessed "much economic muscle, individually as well as cooperatively." *Id.* at 600. The chains also divided territories and customers. The issue is the qualitative effect of the conduct on the ideal of maintaining a competitive process. An inquiry that focuses on the degree of "smallness" or "bigness" is not the end of the analysis, although they may be factors in the process of analysis. A parsing of the practices involved (*i.e.*, joint buying, customer limitations, territorial restrictions, and the like) in light of the goals of the law is of greater significance to determine whether there is a displacement of the competitive process.

[66] Stewart & Roberts, *supra* note 4, at 761.

[67] 390 U.S. 145 (1968).

[68] The problem in *Albrecht* was one of whether The Herald engaged in a unilateral abuse of monopoly power in light of the goals of the law and facts of the case. Permitting a monopolist to have the advantages of vertical integration without the responsibilities of vertical integration by allowing a monopolist to impose maximum price-fixing in the circumstances of *Albrecht*, is not necessarily a wise, just, or appropriate result. *See* Redlich, *supra* note 40, at 21-24.

illegality for vertical maximum price-fixing by contract, combination, or conspiracy is not "justified." If the test for whether the rule is "absurd" is the supposed "light" from *Sylvania*, the absence of much "light" from *Sylvania* probably supports a conclusion that a test of presumptive illegality is justified in view of the impact of the conduct on the independence of traders, intrabrand price competition, and the tradition of narrowly circumscribing the exercise of monopoly power by those seeking the advantage of vertical integration without its attendant risks and burdens.

The conceptualization of per se rules as substantive rules that dictate an either/or result precludes the evolution of sensible standards to sort out conduct in the factual context of a particular case when pro competitive and anticompetitive results become intertwined. The treatment of per se—rule of reason analysis as a single methodology for allocating burdens of proof of varying levels of rebuttability permits a more discriminatory evolution of knowable and practical standards. The single methodology approach enables the process to strike a balance between procompetitive and anticompetitive effects sensibly in the factual context presented by each case and in light of the complex goals of the law. A rule-oriented approach, as in *Schwinn* and *Sylvania*, ends up with an analytical process that focuses on the narrow goal presumed by the rule adopted to the exclusion of other values that the law seeks to achieve and ignores factors not admitted by the hypothesis underlying the rule. The rule-oriented approach generates an irrelevant exercise of the analysis confirming the self-fulfilling prophecies of the rule rather than grappling with the reality before the court. This approach blindly imposes per se rules of legality and illegality with the finesse of a meat cleaver in circumstances where the skill of a surgeon is required.

Attempts to reason within the confines of a rule-oriented methodology, while taking account of the wider range of values embraced by the law and the rich variety of reality tossed up by the adversary process, simply cannot work. The methodology also is unrealistic because it does not permit a pragmatic weighing of the imbalance of bargaining power between buyer and seller, risks that restraints that appear to be vertical are inspired horizontally, the possibility that advertising is in part directed toward imposing entry barriers by inducing irrational consumer choice, or that the business justifications proferred for the restraint are not present, justified in the circumstances, or sufficient in light of less restrictive alternatives. Moreover, attempts to employ the analysis seemingly required by *Sylvania*, yet which take account of the more complex reality of vertical market relationships, generate awkward and complex legal standards that may be beyond the efficient administration of the law. This is where and why I part company with Stewart and Roberts' proposals for standards to deal with the other categories of per se rules in light of the *Sylvania* decision.

V. CONCLUSION

The "stuff" for making fixed, universal, and eternal conclusions about the legality of all vertical market restraints does not appear to be at hand and never will be unless reality and our understanding of it can be frozen in time and space. Relying on the methodology and assumptions of *Sylvania* to establish what "ought" the law to be in the case of other per se tests of illegality is a traditional, but unwise exercise. *Sylvania*, with its narrow assumptions of policy and its rule-oriented approach, is just as objectionable as *Schwinn* as a platform from which to assess other conduct of antitrust concern. The courts and the bar need a principled, but flexible, approach that permits a broader and more sensitive inquiry into the goals of antitrust policy, the facts of specific cases, the practical features of various vertical market restraints, and the gradual evolution of knowable standards grounded in the policies of the antitrust laws, the methodology and limits of the legal process, and the facts of reality.

Stewart and Roberts' analysis of *Sylvania* and its progeny amply illustrate that *Sylvania* does not achieve these goals. Their proposed solutions, constrained by the values and methodology of *Sylvania*, also do not meet these criteria. Understanding per se—rule of reason analysis as a methodology and a means to an end, and not as fixed rules that define categories of legality and illegality, is the first step out of the *Sylvania* quagmire. Per se and rule of reason analysis is a methodology for allocating burdens of proof that range from relatively conclusive presumptions of illegality to evidentiary presumptions of legality determining whether the goals of antitrust policy are impinged in the context of specific cases and categories of conduct. More predictable standards will evolve gradually to guide lawyers in counseling their clients and litigating cases concerning the probability of the legality or illegality of particular practices under all the facts and circumstances of a case. It is, after all, a function of law to both guide and reflect reality in conformity with the basic long term values and goals of the community.

The analysis of vertical market restraints in light of the Court's assumptions and method of analysis in *Sylvania* demonstrates we are still a long distance from fulfilling that function. Indeed, it is the paradox of *Sylvania* that the Court erred in the same fashion as the *Schwinn* opinion by unartfully deciding too much. We ought not clone the error by reproducing elsewhere in the law the implications of *Sylvania* through a modified repetition of its assumptions and methodology for decision by only varying the factual variables. The quagmire of *Sylvania* is a deeper one, necessitating a re-examination of the Court's theology and method for implementing it, if we expect to make sense of antitrust analysis of vertical market restraints.

RETHINKING SHERMAN ACT SECTION 1 ANALYSIS: THREE PROPOSALS FOR REDUCING THE CHAOS

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I. INTRODUCTION

The opening lines of Genesis tell us: "And the earth was without form and void; and darkness was upon the face of the deep." Thereafter, it is reported, "God said, Let there be light; and there was light."[1] Recent events in Section 1 litigation suggest a reverse process has been going on: where we all thought there was light, recent cases seem to say there is no light. Who may sue? Who may be sued? What legal standards apply? What evidence is sufficient to show that a violation has occurred? Some courts have been telling us that these are issues without form and void of meaning. A darkness is falling across the analysis of litigation under the Sherman Act creating a conceptual void without form generating chaos for lawyers trying to advise clients or sensibly litigate antitrust cases.

For example, *United States v. United States Gypsum Co.*[2] tells us that an effect on prices, without more, will not support a criminal conviction for a conspiracy to fix prices under the Sherman Act, despite a widespread prior belief that a purpose *or* effect to fix prices was sufficient to prove a violation of the law. Proof of intent, in the sense of "action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects,"[3] is required in criminal cases;

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[1] *Genesis* 1:3.
[2] 438 U.S. 422 (1972).
[3] *Id.* at 444.

while in civil cases the standard remains that a violation can be established by proof of either an unlawful purpose *or* an anticompetitive effect.[4] A generation of lawyers has learned that horizontal agreements fixing prices are *per se* unlawful but *Broadcast Music, Inc. v. CBS, Inc.*[5] appears to amend the rule by adding "but not always" and *National Society of Professional Engineers v. United States,*[6] spends several pages discussing the rule of reason and the defendant's justification for restricting bidding practices by professional engineers before condemning *per se* an ethical ban severely restricting competitive bidding. The implication was left by *Broadcast Music* and *Society of Engineers* that the Court may have been signaling a relaxation of the *per se* ban on horizontal price fixing. But then along came *Catalano, Inc. v. Target Sales, Inc.,*[7] holding that a horizontal agreement among beer wholesalers to eliminate short-term trade credit formerly granted beer retailers constitutes horizontal price-fixing and "since price fixing agreements have been adjudged to lack any redeeming virtue, [defendant's conduct] is conclusively presumed illegal without further examination under the rule of reason."[8] Little guidance was given concerning when horizontal agreements tampering with the terms of sale will constitute "price-fixing," but once the conduct is shown to effect price it is price-fixing that is conclusively unlawful, except when it is price fixing like that in *Broadcast Music* which is apparently not conclusively unlawful. One may be forgiven a feeling of now you see it, now you do not, usually experienced while watching the shell game at an old country fair when considering this line of cases. Little is said about when an activity is price-fixing and under what circumstances it will be held to be price-fixing subject to a *per se* or a rule of reason analysis.

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[4] *Id.* at 436 n.13. Subsequent lower court cases have been spinning further refinements on Gypsum's definition of the intent element. *See* United States v. Brighton Bldg. & Maintenance Co., 598 F.2d 1101 (7th Cir. 1979), *cert. denied,* 100 S. Ct. 79 (1980); United States v. Gillen, 599 F.2d 541, 545 (3d Cir. 1979), *cert. denied,* 100 S. Ct. 137 (1980) (knowledge of probable anticompetitive effects need not be proved in criminal cases alleging a *per se* violation); United States v. Foley, 598 F.2d 1323, 1335 (4th Cir. 1979), *cert. denied,* 100 S. Ct. 727 (1980); United States v. Continental Group, Inc., 603 F.2d 444 (3d Cir. 1979), *cert. denied,* 100 S. Ct. 703 (1980). For a comprehensive analysis of *Gypsum,* the subsequent cases and criminal law policies with regard to intent, *see* Garvey, *The Sherman Act and the Vicious Will: Developing Standards for Criminal Intent in Sherman Act Prosecutions,* 29 CATH. U.L. REV. 389 (1980).

[5] 441 U.S. 1 (1979).

[6] 435 U.S. 679 (1978).

[7] 446 U.S. 643 (1980).

[8] *Id.* at 1929.

United States v. Arnold, Schwinn & Co.[9] tells us that vertical marketing agreements restricting a dealer's customers and territories where title to the goods has passed are *per se* unlawful, while *Continental T.V., Inc. v. GTE Sylvania, Inc.*[10] a decade later, reverses *Schwinn* and appears to presume on the basis of neo-classical theory that such restraints are *per se* lawful, unless a plaintiff can show them to be an "unreasonable" restraint of trade. In the Court's haste to overrule *Schwinn*, not much was said about what goes into a rule of reason analysis or how one blends the recipe. The Court's analysis cryptically distinguished vertical non-price restraints and other restraints previously deemed *per se* unlawful on the basis of their impact upon "consumer welfare" as defined by the ideology of a narrow school of neo-classical theorists. Since the values and methodology of that school of thought, rigorously applied, lead to a conclusion that almost any government intervention in the market and the free functioning of price theory is counterproductive or at least less effective than the market correcting itself, the Court's *Sylvania* reasoning called all the *per se*'s into question. Although the majority in *Sylvania* took pains to suggest that vertical price-fixing remained *per se* unlawful and that the Court's analysis in *Sylvania* did not upset the rule,[11] lower courts have held the logic of the *Sylvania* opinion dictates a rule of reason analysis of vertical price fixing[12] and some commentators have argued the logic is inescapable—at least for those accepting the unrealistic, artificial and narrow assumptions and methodology of neo-classical economic theorizing.[13]

Elsewhere, both the identity and degree of "*per-seness*" of tying arrangements have been called into doubt, if not abandoned for a rule of reason analysis of whether there is a tie and whether there is leverage in the tying product.[14] The restraints upon the lawful but exclusionary conduct of monopolists imposed by the *Alcoa*[15] and *United Shoe*[16] line of cases has been greatly loosened by *Berkey Photo, Inc. v. Eastman Kodak Co.*[17] and a series of private computer cases against IBM[18] to the point where conduct by a monopolist is presumptively lawful unless one can show it is predatory in the sense of "sinister." The status of horizontal[19] and vertical refusals[20] to deal as *per se* violations has been thrown into doubt by increasing the level of proof over that thought required by previous cases in order to show a conspiracy, by requiring evidence of an anticompetitive effect on a relevant market, or by permitting justification or excuse for the conduct to be weighed once the conduct is shown.

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[9] 388 U.S. 365 (1967).

[10] 433 U.S. 36 (1977).

[11] *Id.* at 51 n.18.

[12] *See In re* Nissan Antitrust Litigation, 577 F.2d 910 (5th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); Eastern Scientific Co. v. Wild Heerbrug Indus., Inc., 572 F.2d 883 (1st Cir. 1978), *cert. denied*, 439 U.S. 833 (1979).

[13] *See* Bork, *Vertical Restraints:* Schwinn *Overruled*, 1977 SUP. CT. REV. 171 (1977); Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. CHI. L. REV. 1 (1977).

[14] *See* United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610 (1977).

[15] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

[16] United States v. United Shoe Mach. Co., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

In private treble damage actions, the lower federal courts continue to spawn unintelligible "standing" requirements despite the seemingly clear language of Section 4 of the Clayton Act vesting a cause of action in "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws"[21] and despite the Supreme Court's admonition in *Radiant Burners, Inc. v. People's Gas & Light Co.*[22] that "[T]o state a claim upon which relief can be granted under . . . [Section 4] allegations adequate to show a violation and . . . that the plaintiff was injured thereby are all the law requires."[23] Depending upon the circuit in which a case is filed, the parties to the litigation may find themselves faced with figuring out whether the plaintiff's injury is "direct or indirect,"[24] within or without a "target area,"[25] within or without an "area of the economy which is endangered by a breakdown of competitive conditions,"[26] is "foreseeable"[27] and not a "ripple effect"[28] of the violation, or whether the plaintiff is in "proximity" or remote "from the center of the alleged conspiracy."[29] Medieval scholastics would find challenging the search for a thread of consistency or objective standards in the "standing" cases, let alone the Supreme Court's rationale and purpose for the curious limitations on the right to sue of *Illinois Brick Co. v. Illinois*.[30]

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[17] 603 F.2d 263 (2d Cir. 1979), *cert. denied,* 440 U.S. 1093 (1980). *See* Comment, *Draining the* ALCOA *"Wishing Well" The Section 2 Conduct Requirements After* Kodak *and* Cal-Comp, 48 FORDHAM L. REV. 291 (1979).

[18] California Computer Products, Inc. v. IBM Corp., 613 F.2d 727 (9th Cir. 1979); Telex Corp. v. IBM Corp., 510 F.2d 894 (10th Cir. 1975), *cert. dismissed,* 423 U.S. 802 (1976); ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423 (N.D. Cal. 1978). *But see* Greyhound Computer Corp. v. IBM Corp., 559 F.2d 488 (9th Cir. 1977).

[19] *See* Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976).

[20] *Compare* Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (3d Cir. 1979) *with* Oreck Corp. v. Whirlpool Corp., 579 F.2d 126 (2d Cir. 1978).

[21] 15 U.S.C. Section 15 (1973).

[22] 364 U.S. 656 (1961).

[23] *Id.* at 660. The Supreme Court precedent on antitrust standing is extremely limited and not of recent vintage. *See* Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948); Radovich v. National Football League, 352 U.S. 445 (1957).

[24] *See, e.g.,* Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910).

[25] *See, e.g.,* Long Island Lighting Co. v. Standard Oil Co. of Cal., 521 F.2d 1269 (2d Cir. 1975), *cert. denied,* 423 U.S. 1073 (1976); Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955).

Where there was once light on such issues as the meaning and role (or lack of it) of intent, "proximate" cause and market analysis in Section 1 private cases, there is now growing darkness and confusion. It is a darkness and confusion which serves no one's interest, except perhaps that of law school placement directors in an otherwise depressed employment market for new graduates. Neither courts, plaintiffs, defendants nor those attempting to abide by the law and avoid litigation are served when unnecessary ambiguity reigns over the important questions of who may sue, who may be sued, what legal standard governs the question of whether the law has been violated, and what facts will show the legal standard has been violated or not violated.

One could go on with instances of the apparent unraveling of at least a minimal level of certainty and predictability in antitrust doctrine. I think that is unnecessary, since this kind of a chugging and churning of antitrust doctrine is not new. Nor is it necessarily always undesirable, since the law is evolving on a common law analytical basis acutely sensitive to new insights, evolutions in judicial ideology, and evolving perceptions of, and dynamic changes in, the reality antitrust law must deal with. The current chugging and churning of antitrust doctrine is disturbing however, for another reason. It is without form and confusing, since no consistent way of thinking about the issues seems to prevail. No common analytical framework and methodology appears to exist among the courts or even within the opinions of any one particular court for consistently or predictably dealing with the issues.

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[26] Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 54–55 (9th Cir.) *cert. denied*, 342 U.S. 919 (1952).

[27] Mulvey v. Samuel Goldwyn Productions, 433 F.2d 1073 (9th Cir. 1970).

[28] California Computer Products, Inc. v. I.B.M. Corp., 613 F.2d 727, 732 (9th Cir. 1979).

[29] Reading Industries, Inc. v. Kennecott Copper Corp., 1979–2 Trade Cas. ¶ 62,906 (S.D.N.Y. 1979).

[30] 431 U.S. 720 (1977). The Court indicated its holding was not one based on plaintiff's standing, *id.* at 729 n.7, but was a result dictated by a concern for mutuality necessitated by Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968), denying the defensive use of passing-on. Basing a decision of who may sue on a "what's good for the goose is good for the gander" philosophy is rather curious when other means exist for resolving the damage concerns of both cases. For example, "passing on" could be recognized as a factor in computing damages where it is likely that subsequent purchasers would sue. It could be ignored where it is unlikely they would sue or mandatory joinder or a pass through of the damages could be required. Indirect purchaser suits should be permitted where the damage claimed is different from that suffered by direct purchasers, direct and indirect purchasers are joined, or an indirect purchaser shows, as a precondition to maintaining its claims, that the direct purchasers are unable or unwilling to sue. It is curious that none of these alternatives were explored in *Illinois Brick* or *Hanover Shoe*. The economic analysis in *Illinois Brick* is also curious. *See* Harris & Sullivan, *Passing on the Monopoly Over-charge: A Comprehensive Analysis*, 128 U. PA. L. REV. 269 (1979).

Concept shoving to achieve a predetermined ideological result, detached from a clear and consistently applied view of the purposes of the antitrust laws, has become the outstanding characteristic of many decisions. *Ad hoc* rule giving and rule application seem to be the order of the day, with little warning or basis for predicting what significant substantive changes are on the way. Nor do the opinions establish a common methodology for understanding their implications once in place. To some extent, this is a result of a change in the ideology of the judges who are rendering leading antitrust decisions. But I believe, that to a greater extent, it is the product of a lack of a common analytical methodology and skill in the use of the law as a process which is generating much of the chaos. Excessive reliance is placed on a rule-oriented mentality and a deductive process of reasoning in the futile hope that words, concepts, models, and deductive logic can be substituted for the art of legal reasoning and judging.

A failure to pay much heed to the *way* we think, as well as *what* we think, about antitrust issues and analysis is the primary source of darkness. The result is a darkness spreading across the problems lawyers and judges must deal with in the context of the unvarnished realities of antitrust litigation and counseling. It is a darkness which must be dispelled if our legal advice is to be reliable, litigation manageable, jury instructions sensible, and our understanding of the law comprehensive.

I believe the sources of darkness can be dispelled and the coming of light and form encouraged if three proposals are followed—both by the courts and lawyers seeking to deal with the growing conceptual morass of Section 1 and Section 2 litigation. None of these proposals requires legislative changes; they are primarily changes in the methodology of how we think about Section 1 and 2 of the Sherman Act and the legal analysis of controversies arising under the act. Both the courts and lawyers need only change their habits of mind concerning *how* they approach and analyze Sherman Act issues. Indeed, I would argue that these changes are consistent with prior doctrine, will cause one to comprehend prior doctrine more intelligently, will expose substantive disputes over what the law ought to be to rational debate, and will cause future litigation or counseling of clients to be more reliable, efficient and predictable.

My three proposals are: first, that the courts and lawyers advising clients abandon the complex and confusing jargon of "standing" doctrine they have been developing and pretending to apply in many antitrust cases to define who may sue and who may be sued. The notion of "standing" should be confined to those ends which it serves elsewhere in the law—namely, to insure the existence of a case or controversy for constitutional purposes and to limit access to the courts where the clear requirements of economy of judicial resources require limitations upon who may sue.[31] Before the members of the defense bar swallow their tongues, or urge that I swallow mine, let me hasten to add that the issues presently analyzed in most, but not all, antitrust cases as questions of "standing" would not disappear from the case. As you will see, they would be thought about and analyzed elsewhere for what they really are—not questions of "standing" to sue but antitrust policy issues derived from the questions of what is the scope of the duties imposed by the antitrust laws upon defendants and what are the corresponding risks plaintiffs are entitled to be protected from by the antitrust laws in the context of private treble damage and injunction litigation.

My second proposal is a subtle one concerning the way we think about the *per se*/rule of reason dichotomy. We should think of both as a single method of analysis for establishing or not establishing evidentiary presumptions allocating burdens of proof rather than a series of substantive rules with square corners capable of neatly dictating legal results whatever the facts, whatever the industry and whatever the circumstances. To borrow a cliché from first year law school classes, *per se* and rule of reason analysis are tools—not rules. They are methods of analysis for determining whether the statue has been violated, not rubrics to be employed as the major premise of a syllogism in deductive logic to then dictate what facts will be required or allowed to make up the minor premise.[32] Before members of the plaintiff's bar swallow their tongues, or urge me to bite mine, let me hasten to add that some of the presumptions would be conclusive in most cases while in others the presumption would merely shift the burden of proof of justification, defense or excuse to the defendant once the particular category of conduct is shown. In still other cases there would be no presumption shifting the burden of proof, but an affirmative burden on the plaintiff to go forward with evidence proving a contract, combination, or conspiracy which unreasonably restrains trade. The fundamental change from what appears to be going on now, however, is to conceive and use *per se* and rule of reason analysis as a single method of analysis for determining whether there has been an unreasonable displacement of the competitive process and not two different sets of substantive rules with one or the other magically appearing or mysteriously selected to mechanically dictate results no matter what the facts.

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[31] *See* Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970); Flast v. Cohen, 392 U.S. 83 (1968); 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE Section 3531 at 175 (1975); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 670–73 (1973). For an excellent jurisprudential and legal analysis of standing, *see* J. VINING, LEGAL IDENTITY (1978).

My third proposal, one embracing and complementing the other two, is borrowed from the imaginative and creative thinking of the late Dean Leon Green,[33] the late Professor E. Wayne Thode,[34] and others,[35] in the field of torts. It is a process for analyzing the issues in a legal controversy called "duty-risk analysis" that I believe can be applied profitably in antitrust treble damage litigation. Duty-risk analysis focuses the litigation on the definition of the duties imposed by the law and the risks the law is intended to protect against in the light of the facts of the controversy and the policies of the law. As I shall attempt to explain later, duty-risk analysis is a way of thinking about the issues in tort litigation which exposes the policy reasons for extending or denying liability to examination rationally rather than hiding policy issues behind meaningless concepts like "proximate," "remote," or "intervening" cause. It also forces a grappling with policy considerations in the context of the facts before the court instead of deciding real cases by imaginary ones or relying upon non-existent "target areas" or "ripples" across intangible concepts of competitive markets. Moreover duty-risk analysis clarifies the division of functions between judge and jury and trial and appellate courts, and makes the evolution of legal standards understandable, predictable, and appropriate rather than fog-bound, quixotic, and unjustified—three characteristics of too much current day treble damage antitrust litigation.

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[32] For an analysis of the legal process as a complex inductive and deductive process of reasoning, *see* Flynn, *The Role, If Any, of Economic Analysis in Antitrust Litigation—A Response*, 12 SW. U. L. REV. 335 (1980). The tendency to think of antitrust principles as rules rather than working hypotheses which may or may not be relevant, vary in meaning, and have a greater or lesser influence on the result depending on the facts of the particular controversy is a pernicious one. Client funds are often squandered in bringing or defending a case some rule superficially indicates is of merit; court time is consumed in unnecessary or useless proceedings or review of erroneous lower court decisions because of a misapplication of a rule; facts relevant to the dispute go unnoticed or unproved since the rule is misunderstood; and, injustice can occur when a legitimate claim is denied or an illegitimate one rewarded because the function of rules in legal decisionmaking is misunderstood. The particular tendency of thinking reality is dictated by the artificial models of a school of economic theorizing and that the definition of what is lawful and what is not is to be determined by the predictions of the models without inquiry into the underlying assumptions of the models and the facts of the controversy has generated much of the current darkness in antitrust litigation. While there may be "form" to the models, it is an illusion of form covering a void caused by the misuse of economic models as deductive premises in what is primarily an inductive process of the law. *Cf.* M. HOLLIS & E. NELL, RATIONAL ECONOMIC MAN (1975); Wiles, *Ideology, Methodology and Neoclassical Economics*, 2 J. POST–KEYNESIAN ECON. 155 (1979/80).

[33] Dean Green's major writings on the topic are collected in L. GREEN, THE LITIGATION PROCESS IN TORT LAW (1965).

[34] Professor Thode's views are summarized in Thode, *Tort Analysis: Duty Risk v. Proximate Cause and the Rational Allocation of Functions Between Judge and Jury*, 1977 UTAH L. REV. 1.

[35] *See, e.g.*, L. GREEN, W. PEDRICK, J. RAHL, E. THODE, C. HAWKINS, A. SMITH & J. TREECE, CASES ON TORTS (2d ed. 1977); L. GREEN, W. PEDRICK, J. RAHL, E. THODE, C. HAWKINS, A. SMITH & J. TREECE, ADVANCED TORTS: INJURIES TO BUSINESS, POLITICAL AND FAMILY INTERESTS (1977).

None of these proposals are easy to understand or appreciate because they require changes in our habits of mind; changes in *how* we think about antitrust cases. But with your patience and forbearance, permit me to explain each, how they interrelate; why they can bring light where there is now darkness, a lack of form and a void; and, what the practical implications of each may be for pursuing or defending a claim under Section 1 of the Sherman Act. Their significance is more than theoretical as I hope you will see, since they can bring order to the litigation and one's comprehension of the "law" where there is now a growing sense of chaos.

II. ANALYSIS OF THE PROPOSALS

A. STANDING

A relatively large number of antitrust treble damage cases are decided upon or become heavily involved with issues labeled as "standing" issues. It has been a curious development, since most of the complex law of antitrust "standing" has been developed by lower federal courts with little guidance from the Supreme Court. The Supreme Court precedent on antitrust standing is scanty, not of recent vintage,[36] and contrary to the current lower court uses of standing. Moreover, many of the antitrust "standing" cases do not involve what are commonly understood as standing issues elsewhere in the law.

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[36] *See* cases cited *supra* note 23.

In an important article on antitrust standing, Professor Richard Tyler[37] makes a persuasive case for limiting standing analysis in antitrust cases to serve the two functions it serves elsewhere in the law: the constitutional function of insuring a case or controversy and the function of rationing scarce judicial resources by excluding cases not amenable to resolution efficiently by the judicial process.[38] The rationing function is one of allocating decision-making among and between the various branches of government. In this sense, "the essence of the standing inquiry is to determine whether the plaintiff's claim has been committed to the judiciary for resolution.[39] Neither the "case or controversy" nor "rationing" issue is present in most antitrust cases where the courts invoke "standing" as a concept to exclude a plaintiff from maintaining a case.

What is usually involved when standing is invoked under some rubric like "target area," "direct-indirect," "ripple effect," "proximity to the violation" and so on is a judicial attempt to limit the potentially unlimited liability of an alleged antitrust violator, draw some boundary on the scope of the liability otherwise imposed by the law, or quite simply get rid of a complex case clogging the court's otherwise busy schedule even though amenable to efficient resolution by the judiciary. Those who would invoke these considerations under the rubric of "standing" usually are motivated by either a dislike of treble damage litigation or a belief that treble damage litigation is counterproductive. In the belief that Congress has granted private claimants the right to sue for treble damages and charged courts to countenance their claims, a circumstance unlikely to change, I proceed on the assumption that a dislike of treble damage suits or a belief they are counter productive is wholly irrelevant to the legal question of the appropriate role of standing analysis in antitrust cases. They are considerations relevant to a legislative attempt to amend the statute; but not to judicial analysis of the statute in place.

Section 4 of the Clayton Act[40] imposes only three requirements on an antitrust plaintiff: (1) the plaintiff be injured, (2) in his business or property, (3) by reason of an antitrust violation committed by the defendant. There is no requirement that the plaintiff be in, around or on the edge of a "target area"; that the injury be direct rather than indirect, that the plaintiff be "proximate" rather than remote; or that the injury be caused by a tidal wave rather than a "ripple." The Supreme Court cases which touch on the issue do not require these additional limitations on a plaintiff's right to maintain the suit.[41]

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[37] *Private Antitrust Litigation: The Problem of Standing,* 49 U. COLO. L. REV. 269 (1978).

[38] *Id.* at 272.

[39] *Id.* at 273.

[40] 15 U.S.C. Section 15 (1973).

There are, of course, legitimate concerns with exposing an antitrust defendant to liability at the instance of every conceivable person injured by the ripple effects of a violation throughout the economy.[42] There is a possibility, although remote in most instances,[43] that a defendant's damage liability may far exceed the gain from violating the law or that multiple recoveries would be had. All these issues, however, are not "standing" issues and cannot be resolved expeditiously or predictably by the creation of arcane standing concepts or the construction of elaborate multipart tests, primarily factually based, to be weighed at preliminary stages of the litigation analyzing the policy issues *sub rosa* by an attempt to measure the distance a plaintiff is from the violation alleged.[44] The attempt to do so greatly complicates the fundamental question of who may sue or be sued, results in a trial of some or all of the merits in the preliminary stages of the proceeding, confuses the issue of who may sue with the issues of what it is that violates the law and the scope of one's liability for doing so, and masks substantive and fundamental antitrust policy decisions required to decide these kinds of questions behind manipulation of subjective concepts like "target area," "proximate" and "direct-indirect" which avoid discussion of the antitrust policy issues involved. The direction, distance traveled, speed, obstacles hurdled and angle of the impact of an antitrust violation on a plaintiff's business or property have nothing to do with "standing." The attempt to make them do so has only generated confusion, complexity, denial of the right to sue granted by Congress, and unpredictability in the law.

As I shall discuss subsequently, limiting the scope of liability, preventing multiple recoveries and insuring that only legitimate antitrust claims go to trial can be achieved more rationally and sensibly elsewhere in the litigation, where the underlying policies can be exposed to analysis. Only then will standards giving predictability to the law be sensibly fashioned pursuant to the basic policies of the antitrust laws, rather than some subjective notion of target area, direct or indirect and the other meaningless jargon of current antitrust "standing" tests. In this way, legitimate standing issues and issues going to the merits can be kept separate and not confused. As Mr. Justice Brennan noted in his concurring opinion in *Association of Data Processing Services Organizations v. Camp,*[45] "standing, reviewability, and the merits pose discrete, and often complicated, issues which can best be resolved by recognizing and treating them as such."[46]

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[41] *See* cases cited *supra* note 23.

[42] *See* Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809, 851–52 (1977); Comment, *Standing to Sue in Antitrust Cases: The Offensive Use of Passing-On*, 123 U. PA. L. REV. 976, 993 (1975).

[43] *See* Tyler, *supra* note 37 at 287.

[44] For examples of such complex tests, *see* Berger & Bernstein, *supra* note 42; Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 30–31 (1971); Sherman, *Antitrust Standing From* Loeb *to* Malamud, 51 N.Y.U. L. REV. 374 (1976).

Lower courts have not often recognized the differences between standing issues and the merits but have confused the two with subjective and unpredictable mental pictures of moving "target areas," proximity of cause, or directness and indirectness of the injury. For example, in *Long Island Lighting Co. v. Standard Oil Co.,*[47] the Second Circuit dismissed on standing grounds the claims of New York electric utilities that an alleged boycott of low sulphur Libyan crude oil, oil the utilities were required to use because of environmental regulations, resulted in the utilities having to pay unlawfully higher prices to obtain Libyan crude from other sources. The alleged boycott caused the defendants to stop supplying the utilities' importer, thereby causing the importer to obtain Libyan crude elsewhere at higher prices. The court held Libya was the target of the boycott, the utilities were not the "immediate target," the utilities' injuries were the result of injury to an "intermediate non-target" and, although their injury was "foreseeable," the plaintiffs were too "remote" for standing. A second count charging a conspiracy to monopolize the East Coast market for the sale of low sulphur crude was upheld, since it "move[d] the target area of the alleged conspiracy from Saudi Arabia and Libya to the East Coast of the United States."[48] Moving targets, direct and indirect targets, intermediate nontargets, and "too remote" are scarcely objective, knowable or workable standards for deciding who may sue and who may be sued under the antitrust laws. They result in pleading being raised to an arcane art form requiring a guess at what will be found not remote or within the parameters of an undefined "target" area in the mind of a particular judge.

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[45] 397 U.S. 150 (1970).

[46] *Id.* at 170.

[47] 521 F.2d 1269 (2d Cir. 1975), *cert. denied,* 423 U.S. 1073 (1976). Another misleading and conceptually confusing Second Circuit case is Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), *cert. denied,* 406 U.S. 930 (1972).

[48] 521 F.2d at 1276.

It makes possible deciding whatever a court wishes to decide in light of the court's subjective and unannounced view of the underlying merits of the suit, personal views on the merits of antitrust policy and treble damage suits or the burden the case may place on the court's docket.

Reading Industries, Inc. v. Kennecott Copper Corp.[49] illustrates well these propositions. The gist of the complaint alleged that the producers of primary copper conspired to hold down the price of copper between 1964 and 1970. The alleged conspiracy caused a shortage of domestic primary copper, thereby causing the price for foreign primary copper to rise and the price of copper refined from scrap to rise relative to the price for domestic primary copper. The plaintiff, Reading, a fabricator of copper tube, did not have access to domestically refined primary copper but was dependent upon copper refined from scrap. Claiming the conspiracy to fix prices below what they should have been in primary copper caused scrap-refined copper prices to go up dramatically through the foreseeable and natural operations of the copper markets thereby injuring Reading in the sale of fabricated products in competition with fabricators with access to cheaper primary copper, Reading sought treble damages from the major domestic copper producers for their alleged conspiracy.

The trial court granted the defendant's motion for summary judgment on the ground that Reading had no standing to sue. The court did so on the theory that Reading did not meet the court's "proximity-remoteness" test, explained as a measurement of the "plaintiff's proximity or remoteness from the center of the alleged conspiracy."[50] In the court's view, "Reading's claim that its injury was caused by the defendants holding down prices, which in turn is claimed to have raised prices on the . . . [foreign primary market] and in the scrap market, which in turn required Reading to pay prices higher than it otherwise would have is too remote to fall within the 'target area' as described by the Second Circuit cases."[51] Why Reading's claims were "remote" and

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[49] 1979-2 Trade Cas. ¶ 62,906 (S.D.N.Y. 1979), *aff'd*, 1980-2 Trade Cas. ¶ 63,559. The author assisted plaintiff's counsel in briefing the standing issues before the district court. Neither the plaintiff nor its counsel is responsible in any way for the comments or analysis of the district court or court of appeals opinions made herein.

[50] 1979-2 Trade Cas. at 79,218.

[51] *Id.* at 79,218-219.

"too remote" to fall within the imaginary "target area" of the conspiracy was never explained. While Reading was relying upon an economic chain of causation, it was one which involved no intervening claimants, was inevitable and was foreseeable. The historic relationship of primary and scrap prices provided an initial basis for proof of damages if any. The court's ruling did not grapple with the antitrust policy question of whether the antitrust laws protect a competitor at the fabricating level of the market relying on scrap copper from a conspiracy at the supply level of the market displacing competition for primary copper and thereby inevitably raising prices for scrap copper causing injury to competition and a competitor in fabrication of finished copper products. By analyzing the issue under the rubric of standing and using the vehicles of "remote" and "target area" to do so, the court missed the core issue of the case, overlooked the antitrust policy issues of the case, imported ambiguity into the law, deflected the parties from litigating what was at issue, and generated further confusion and complexity surrounding the fundamental question of who may sue.

On appeal, a panel of the Second Circuit after gratuitously and inappropriately characterizing the case as "a somewhat bizarre attempt to obtain damages under the antitrust laws"[52] muddled the matter further. After acknowledging the perimeters of the antitrust limitations upon who may sue and what is a proper claim are uncertain, and that the "tests" employed by the Second Circuit for antitrust "standing" are also uncertain, the Court decided to affirm on grounds which the parties had not argued. The Court held that "the causal relationship between defendants' alleged violation and Reading's payment of high scrap prices is too remote to permit the imposition of liability."[53] In what some might characterize a "bizarre" analogy extending *Illinois Brick Co. v. Illinois* to claims where a plaintiff was not suing as an indirect purchaser and apparently without the benefit of a factual record or argument on the question, the court held: "[T]o find antitrust damages in this case would engage the Court in hopeless speculation concerning the relative effect of an alleged conspiracy in the market for refined copper on the price of copper scrap, where countless variables could have intervened to effect those pricing decisions."[54] If a trial of the facts had been held, it "could" just as possibly have turned out that the relative price of scrap and primary was effected by the alleged conspiracy and not by unidentified "countless variables." Decision by speculation and hypotheticals was substituted for a factually based analysis of the case before the court. The speculative ("could have intervened") invocation of the meaningless ghosts of "remote," "proximate" and "intervening" cause, without even the benefit of a record to support the speculation, was abetted by the court's further speculative observation that "[i]t could be said that Reading . . . is not in the target area of the defendant's alleged violation in maintaining artificially low prices for refined copper."[55] This conclusion was apparently reached upon the assumption that the normal victim of that kind of violation is a competing seller of refined copper unable to meet the artificially low prices of the conspirators; a case not before the court.

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[52] 1980–2 Trade Cas. ¶ 63,559 (1980).

[53] *Id.*

[54] *Id.*

It "could" just as easily also "be said" that Reading was within the "target area" of the conspiracy, since it claimed injury as a competing fabricator forced to pay higher prices for its raw materials due to the foreseeable and predictable effect of the defendants' alleged conspiracy to fix prices and limit supply in refined copper upon the price for copper refined from scrap. Moreover, the plaintiff was also apparently prepared to prove the existence of a measurable, predictable and foreseeable relationship between prices in the market for scrap copper and prices for refined copper.[56] The trial court's dismissal of the claim on

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[55] *Id.*

[56] Reading Industries, Inc. v. Kennecott Copper Corp., Plaintiff Brief in Opposition to Defendants' Motion for Summary Judgment 371–433 (71 Civ. 1736 (MEL) S.D.N.Y. (1979)). Defendants' Brief in Support of the Motion for Summary Judgment and Reply Brief in Support of the Motion for Summary Judgment, did not direct their attack to plaintiff's long factual recital claiming an ability to prove a direct factual connection between the conspiracy alleged and measurable antitrust injury to the plaintiff. The causation and damage arguments raised by the defendants, quite properly on a motion for summary judgment where all factual issues are resolved in favor of the party moved against, were legal arguments that plaintiff either had no standing to maintain its suit or its claims were barred by the doctrine of *Illinois Brick*. Given the posture of the case on a motion for summary judgment, one must assume the Second Circuit's decision is one of law; *viz.*, even if the plaintiff could prove a direct factual connection between the conspiracy alleged and injury to it, and provide a factually based measure of damage with sufficient certainty to escape the difficulty of speculative damages, as a matter of law plaintiffs could not maintain their suit. What the holding of law is remains a puzzle. Three possibilities come to mind, each of questionable consistency with prior doctrine and of substantial significance: (1) a conspiracy fixing prices too low is not within the prohibitions of the Sherman Act; (2) a firm injured at one level of a market as a result of a conspiracy by its competitors at another level of the market does not have standing; or (3) only direct purchasers may maintain treble damage actions for price fixing conspiracies under Section 1 of the Sherman Act. Given the superficial analysis of the facts of the case by the Court, it is perhaps appropriate to treat these possible holdings as equally superficial rulings of what the law is and of no merit in other litigation.

"standing" grounds and the appellate court's affirmance of the dismissal on a mishmash of "standing," causation, and proof of damage speculation in the preliminary stages of the case precluded the plaintiff from establishing the facts of its claim and the court from intelligently assessing the difficult issue it really confronted. The issue the court was confronted with was the definition of the scope of the duty imposed by the antitrust laws and the risks the law is designed to prevent. Determining that issue requires an analysis of the policy goals of the antitrust laws, the function of the antitrust laws as a source of legal protection for competitors as well as the competitive process, the function of treble damage litigation in fairly achieving these goals and the limits of the judicial process in carrying out the goals of antitrust treble damage enforcement in light of the record facts of the case before the court. Deciding these kinds of issues behind a smokescreen of unsupported factual speculation and hypothetical cases about causation and damage proof and "could be said" ruminations about meaningless and subjective "standing tests" only further muddles the questions of who may sue and what is it that violates the law.

As I shall elaborate later, limiting the standing issue to its narrow role elsewhere in the law, discarding the confused and confusing jargon of the peculiar lower court "standing" analysis in antitrust cases, dealing with the difficult issues now mistakenly analyzed under standing analysis elsewhere in the litigation, and avoiding confusion of causation and uncertainty in proof of damages, will not make the difficult policy issues go away or necessarily open wider the courthouse door to antitrust plaintiffs. What it will do, is require the analysis to confront openly the antitrust policy issues involved and develop understandable, workable, and predictable standards defining the scope of antitrust liability and who may sue, rather than speculate without a firm or fair basis for doing so. Before demonstrating how this is so, let me turn to another major source of confusion and chaos in Section 1 litigation and my second proposal for reform—changing the way we think about *per se*/rule of reason analysis.

B. THE *PER SE*/RULE OF REASON DICHOTOMY

It is common to think of *per se* and rule of reason analyses as two differing categories of rules; the former presenting well defined species of conduct which a rule of law labels unlawful in and of itself, while the latter embraces every other form of joint or collaborative conduct where a showing of unreasonableness of the restraint—pursuant to a known package of elements—is required before the conduct is labeled illegal.[57] This view assumes each category of analysis as establishing substantive rules of law, with the *per se* category broken into several subrules labeling specific and identifiable categories of conduct like price-fixing, group boycotts, horizontal divisions of markets, tying arrangements and so on illegal on their face. Facts are then placed inside the "*per se*" mold, and if they fit, the conduct is illegal, and if not, a rule of reason analysis takes place. Rule of reason analysis is less well defined, but appears to result in the case being analyzed pursuant to an enumerated number of factors which must be present before joint conduct restraining trade is found to be unreasonable. The identity of the factors and how they are weighed and blended are both vague. Application of rule of reason analysis, more often than not, usually results in finding the conduct lawful. But, on occasion, courts have held conduct not classified as *per se* unlawful an unreasonable restraint of trade under a rule of reason analysis.[58] Conceptualizing *per se* and rule of reason analyses as rules and as separate methods of analysis can be useful in the vast number of cases never litigated and in giving clients advice in most normal circumstances. This perspective tends to break down, however, when something is worth litigating because of unique circumstances or serious factual disputes over whether the conduct involved is pursuant to joint action, falls within a *per se* category or is reasonable if not within a defined category of *per se* illegality.

Difficulties and chaos break out when we conceptualize *per se* and rule of reason doctrine as separate substantive *rules*, rather than a single *method* of analysis generating differing evidentiary presumptions for allocating burdens of proof[59] regarding the degree to which the *quality* of the collaborative activity displaces competition as the rule of trade. Further difficulty breaks out when one fails to note that in most of the *per se* cases worth litigating a form of rule of reason analysis, in the sense of an extended evidentiary inquiry under a common set of factors, can break out at one or more of three points of the analysis:

1. Is it appropriate to draw the inference that the claimed *per se* con-

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[57] *See* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (pts. 1 & 2), 74 YALE L.J. 775 (1965), 75 YALE L.J. 373 (1966); Loevinger, *The Rule of Reason in Antitrust Law*, 50 VA. L. REV. 23 (1964). For an excellent analysis of the recent debate and litigation on the *per se*/rule of reason dichotomy *see* Redlich, *The Burger Court and the Per Se Rule*, 44 ALBANY L. REV. 1 (1979).

[58] *See* Mackey v. NFL, 543 F.2d 934 (8th Cir. 1976); American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230 (3d Cir. 1975).

[59] An insight developed by Van Cise, *The Future of Per Se in Antitrust Law*, 50 VA. L. REV. 1165 (1964).

duct is pursuant to a "contract," "combination" or "conspiracy" within the meaning of the Sherman Act?[60]

2. Is it appropriate to draw the inference that collaborative conduct should or should not be *per se* unlawful or is within or without the *per se* category of conduct; for example, is a joint buying program by competing oil companies of excess oil production "price-fixing"?[61] In other words, what facts will give rise to a finding that some conduct will be found to be within a particular *per se* violation?

3. Assuming there is conduct meeting the requirements of a contract, combination or conspiracy for Section 1 purposes and that the conduct falls within a category of conduct recognized as *per se* unlawful, or nearly so, are there any unique circumstances of the business[62] or other public policies which may justify, excuse or mitigate a finding of illegality in rare cases by requiring a more extended evidentiary proceeding?[63]

In each of these circumstances, courts frequently find themselves involved in a limited rule of reason analysis where evidence is weighed on some or all of the elements traditional to a rule of reason case in order to resolve what is at issue: has the defendant's joint action unreasonably displaced the competitive process?[64] The issue is a *qualitative* one of measuring the impact of the conduct on the ideal of a competitive process in the context of the particular industry or trade and in light of the political, social, and economic purposes for relying on the competitive process as the rule of trade. The issue is not a *quantitative* one of determining how much competition is effected or destroyed by the practice, although power, relevant market, and quantitative effect may aid in determining qualitative impact in some limited circumstances.

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[60] *See, e.g.*, Albrecht v. Herald Co., 390 U.S. 145 (1968); United States v. Parke Davis & Co., 362 U.S. 29 (1960); Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939); Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962). The problem of whether intra-enterprise collaboration should be considered a contract, combination or conspiracy for Section 1 purposes may also provoke a rule of reason type analysis. *See* Kiefer-Stewart Co. v. Joseph E. Seagrams & Sons, Inc., 340 U.S. 211 (1951); Joseph E. Seagrams & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970). *Cf.* United States v. Morgan, 118 F. Supp. 621 (S.D.N.Y. 1953) (whether a joint venture is a conspiracy for Sherman Act purposes).

[61] *See* United States v. Socony–Vacuum Oil Co., 310 U.S. 150 (1940), where an extended trial was held on just this question. For an excellent analysis of more recent cases, *see* Allison, *Ambiguous Price Fixing and the Sherman Act: Simplistic Labels or Unavoidable Analysis?*, 16 HOUS. L. REV. 761 (1979).

[62] *Compare* Board of Trade of Chicago v. United States, 246 U.S. 231 (1918) (centralizing sale of grain futures on a public commodity exchange) *with* National Soc'y of Professional Engineers v. United States, 435 U.S. 679 (1978) (claim of protecting public safety by restricting competitive bidding rejected; less restrictive alternatives available for protecting public safety other than a direct displacement of price competition). *See also* United States v. Morgan, *supra* note 60.

[63] *See* Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979) (collaborative action fixing prices necessary to make copyright holders' protected rights effective and permitted by an antitrust consent decree held not *per se* unlawful).

[64] *See* National Soc'y of Professional Engineers v. United States, 435 U.S. 679 (1978): "[The Rule of Reason] focuses directly on the challenged restraint's impact on

Normally, however, the qualitative impact of joint conduct upon the ideal of maintaining a competitive process as the rule of trade may be determined through the analysis of a well known series of elements. Those elements include: "(a) the peculiar characteristics of the industry; (b) the power of the participants; (c) the horizontal or vertical nature of the . . . [joint action]; (d) the purpose of the . . . [joint action]; (e) the effect of the . . . [joint action]; (f) the public and private benefits of the . . . [joint action]; (g) public and private detriments of the . . . [joint action]; and (h) the availability of less restrictive alternatives to avoid the detriments and achieve the benefits. . . ."[65] The obvious displacement of goals of the competitive process and experience in enforcing the law can lead and has led to presumptions that certain conduct is so directly antithetical to the maintenance of the competitive process as the rule of trade that the courts are warranted in finding the conduct conclusively, or nearly so, unlawful. Other conduct is more ambiguous, necessitating a less conclusive presumption; while still other conduct is at least neutral and requires an extended analysis in light of all the facts and circumstances of the case before it is concluded to be lawful or unlawful. The spectrum from *per se* to rule of reason analysis is a single methodology presenting varying levels of evidentiary presumptions ordering the analysis of whether there has been an unreasonable displacement of the competition process.

Conceptualizing *per se* doctrine as a separate category of rules and rule of reason analysis as necessarily requiring a significant quantitative effect on competition has engendered confusion in the cases. By the same token, cases many consider presenting *per se* unlawful conduct

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competitive conditions." *Id.* at 688. "The test . . . is whether the challenged contracts or acts 'were unreasonably restrictive of competitive conditions.' Unreasonableness under this test could be based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. Under either branch of the test, the inquiry is confined to a consideration of the impact on competitive conditions." *Id.* at 689.

[65] L. SCHWARTZ & J. FLYNN, ANTITRUST AND REGULATORY ALTERNATIVES 467 (5th ed. 1977).

after they are litigated, frequently involved extended evidentiary contests under some combination of the above factors over whether there was collaborative activity amounting to a contract combination or conspiracy or whether the conduct is or is not within a *per se* category. The failure to recognize these realities often engender confusion in subsequent litigation. It is not enough to know that a conspiracy to fix prices is *per se* illegal; one must know what facts will give rise to the inference of a conspiracy and what facts will give rise to the inference that the conspiracy is one which will be legally identified as "price-fixing." Considerable "rule of reason" type evidence may be required to justify the inference that there is a conspiracy or that it is one to "fix prices." Of even more significance to lawyers than the conclusion reached, is the method by which a court will reach such conclusions, since the analytical framework by which a case is decided provides the intellectual basis from which to extrapolate the implications of the reasoning to other facts and circumstances.

Thinking about *per se* and rule of reason analyses as methods for establishing evidentiary presumptions allocating burdens of proof to structure an analysis of whether or not the competitive process has been displaced pursuant to a contract, combination, or conspiracy clarifies much of the mystery of recent twists and turns in the case law. For example, horizontal agreements fixing prices are presumptively unlawful; almost, but not quite conclusively so. When a case comes along like *Broadcast Music, Inc. v. CBS, Inc.*,[66] it should not create a mental cramp to recognize that in some rare cases the presumption should give way to a more extended analysis admitting a defense or justification because of the unique nature of the business involved and other government responses regulating the conduct. It is obvious from a following of its methodology that the Supreme Court in *Broadcast Music* assumed *per se* analysis to be a form of rule application rather than a methodology for establishing evidentiary presumptions. After first attempting to state that what was involved was not price-fixing even though it clearly was, the Court then proceeded to examine a series of justifications and excuses for the practice in light of the unique characteristics of the business and other regulatory means, including rule of reason analysis, for controlling abuses of an admittedly unique circumstance. A much clearer opinion, consistent with prior precedent and meaningful for subsequent litigation, would have been created if the Court recognized the doctrine of *per se* illegality as a device for creating an evidentiary presumption of illegality; that the defendant's conduct invoked the presumption or did not do so if the conduct could be characterized as a joint venture; that the presumption of illegality for price-fixing where reached is almost but not always conclusive; spelled out the rare circumstances in which evidence showing the arrangement should be considered a joint venture or that excuse or justification would be permitted even if the arrangement should be treated as a combination of competitors; and, sent the case back for retrial on one or more of these grounds.

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[66] *Supra* note 63.

Those who conceptualize *per se* rules as substantive rules and use them to categorize rather than analyze the facts, find their tidy world of rules upset by cases like *Broadcast Music*. The rule prohibiting price-fixing admits of no excuse or justification in this line of thinking. When a case like *Broadcast Music* comes along and is decided in a legalistic rule application method of analysis, the rule seems no longer capable of predicting results and breeds uncertainty in subsequent cases. This state of mind and affairs is unnecessary once it is perceived that *per se* analysis is a methodology for establishing evidentiary presumptions of an illegal combination or a combination that unreasonably restrains trade, of varying levels of rebuttability, and not a set of rules used to cram facts into an immutable rule indiscriminately. The crucial question is what facts will give rise to a presumption of illegality, how conclusive is the presumption, and what circumstances, if any, will justify permitting a rebuttal of the presumption. From the history of Sherman Act litigation, it is apparent that reliance upon a presumption of illegality is likely to arise where the facts induce a conclusion that joint action is directly displacing the competitive process or some central goal of the competitive process.[67] The more central the goal being displaced, (price competition as the mechanism for establishing price and allocating resources) the more likely a presumption of illegality and the more conclusive the presumption. The less clear the goals of antitrust policy involved or the more confused anticompetitive effects become with procompetitive effects as a result of the practice (vertical territorial restraints), the less conclusive the presumption allocating burdens of proof. Where no immediate impact on the goals of antitrust policy is perceived, no presumptions are created; and, a plaintiff must show under all the circumstances that there is a restraint which unreasonably displaces the competitive process as the rule of trade.

Consequently, cases like *Catalano, Inc. v. Target Sales, Inc.*,[68] following hard on the heels of *Broadcast Music and National Society of Professional Engineers v. United States*[69] should not create a stir, if Section 1 analysis were understood as creating a series of evidentiary presumptions of varying levels of rebuttability rather than substantive rules with square corners and no exceptions, capable of dictating the appropriate result in every case. In *Catalano,* the court reiterated the *per se* rule against horizontal price-fixing in circumstances where beer distributors allegedly conspired to eliminate short-term credit granted beer retailers. Unfortunately, the court did not explain when collaborative action tampering with the terms and conditions of sale constitutes "price-fixing," although it was appropriate to assume the conduct in *Catalano* was "price-fixing," since elimination of short term credit directly and significantly effected the price to retailers and, ultimately, to consumers.[70] Since the maintenance of price competition is a central goal of a competitive process, joint conduct "tampering" with prices is presumptively unlawful even if it does not wholly displace price competition, but only tampers with one element influencing price.[71] The failure of *Catalano* to explore when conduct effecting some element contributing to price will constitute a sufficient "tampering" to be labeled "price-fixing" will not help in future cases raising similar issues. The court's treatment of *per se* analysis as a rule rather than a tool for allocating burdens of proof, even though the result appears appropriate, makes *Catalano* less than a clarifying precedent after *Broadcast Music.*

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[67] *See* Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898).

[68] 446 U.S. 643 (1980).

The analytical confusion which abounds in such areas as the *Parker v. Brown*[72] state action doctrine becomes at least less murky when one conceives of Section 1 analysis as consisting of an evidentiary methodology for determining when a displacement of the competitive process by joint action will or should be decided unlawful in light of a variety of constitutional and antitrust policy goals. State and local legislation encouraging, sanctioning, permitting or mandating a displacement of the competitive process is at least suspect under the Sherman Act's declaration of a national policy of free competition. Considerations of federalism, however, may and should mitigate any presumption of illegality under the Sherman Act where a clearly articulated and actively managed state policy consciously chooses otherwise,[73] although the commerce clause of the Constitution may serve as an outside constraint upon state authority to displace the competitive process with state regulation.[74] The problem is one of developing a workable process for sensibly weighing the competing and conflicting goals wrapped up in the policies of federalism and the goals wrapped up in a policy of relying upon the competitive process as the rule of trade. Recognition of the analytical process under Section 1 of the Sherman Act as a series of evidentiary presumptions exposes the policy inquiry to rational and pragmatic examination and development.

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[69] *Supra* note 64.

[70] 446 U.S. at 645–649.

[71] *See* United States v. Socony–Vacuum Oil Co., *supra* note 61.

[72] 317 U.S. 341 (1943).

[73] *See* New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978); Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978); Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

For example, where private parties, or state or local governments acting in a proprietary capacity, engage in conduct displacing the competitive process pursuant to state law, the conduct should be considered presumptively unlawful subject to the defense that the activity in question is compelled by the state, pursuant to a clearly stated state policy, which policy is actively supervised by the state. This is the test followed in the Court's most recent "state action" antitrust case, *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*[75] In that case, the Court found the activity claimed unlawful, vertical resale price maintenance in the wine trade in California, was done pursuant to a clearly stated and affirmatively expressed state policy, but that there was no state supervision of the acts claimed unlawful—the fixing of resale prices and the prices which were fixed. A finding of an express and affirmatively stated state policy actively supervised by the state compelling horizontal or vertical price fixing rebuts the presumption of illegality, except where further analysis on preemption[76] or other grounds[77] invalidates the statute in question.

Other *per se* conduct, for example, horizontal divisions of markets,[78] and vertical price-fixing, should be and is also deemed presumptively unlawful on a nearly conclusive basis.[79] Such conduct clearly tampers with a central goal of the competitive process, price competition and resource allocation, although unique circumstances may ameliorate the conclusiveness of the presumption in rare or unique circumstances.[80] The same may be said for horizontal and vertical boycotts in light of the qualitative effect of the conduct where it is done with a purpose to exclude a competitor. Recent cases employing a quantitative test for vertical boycotts improperly convert the standard to a Section 2 test, thereby denying plaintiffs the right to operate their business pursuant to the competitive process free from combinations and conspiracies to deprive them of that right, as well as deprivation of the right to succeed or fail on the competitive merits by exercises of monopoly power having the same effect.[81]

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[74] *Compare* Lewis v. B.T. Investment Managers, Inc., 100 S. Ct. 1848 (1980); Hughes v. Oklahoma, 441 U.S. 322 (1979); *and* H.P. Hood & Sons v. DuMond, 336 U.S. 525 (1949) *with* Reeves, Inc. v. Stake, 100 S. Ct. 2271 (1980).

[75] 100 S. Ct. 937 (1980).

[76] *See* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951).

[77] *See* Bates v. State Bar of Arizona, *supra* note 73 (minimum fee schedules for lawyers enforced by the state Supreme Court violate a First Amendment right of commercial speech).

[78] *See* United States v. Topco Assocs., 405 U.S. 596 (1972); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

[79] *See* United States v. Parke Davis & Co., *supra* note 60.

Lower levels of presumptive illegality may be appropriate in cases like vertical divisions of territories and customers, despite the court's ruling in *Continental TV, Inc. v. GTE Sylvania, Inc.*[82] While *United States v. Arnold, Schwinn & Co.*[83] may have created too rigid a presumption of illegality, *Continental TV* appears to have gone to the opposite extreme and created too rigid a presumption of legality in light of both the impact of such restraints upon the competitive process and the questionable universality of the justifications put forth to excuse such restraints.[84]

Whatever the merits of the arguments surrounding the degree to which vertical non-price restraints ought or ought not be presumed unlawful, the Court's methodology in both *Schwinn* and *Sylvania* reflects a perception of the *per se* and rule of reason analyses as rules capable of dictating results rather than a single methodology for sensibly allocating burdens of proof in the complex task of determining when the competitive process has been displaced unreasonably by joint action amounting to a contract, combination or conspiracy in a bewildering array of differing facts, circumstances and industries. An either/or situation is created, rather than the more appropriate and realistic evolution of various levels of evidentiary presumptions based upon the quality of the conduct's impact upon the goal of maintaining a competitive process as the rule of trade in light of the particular facts and circumstances of the case.

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[80] *See* National Ass'n of Window Glass Mfrs. v. United States, 263 U.S. 403 (1923) (division of territories to save a failing business); Board of Trade of Chicago v. United States, 246 U.S. 231 (1918) (price-fixing); Denison Mattress Factory v. Spring-Air Co., 308 F.2d 403 (5th Cir. 1962) (division of territories to limit or protect a trademark); United States v. Morgan, *supra* note 55. Every practice condemned on a *per se* basis has, at one time or another and in light of the unique circumstances of the case, been held to be subject to a rule of reason analysis. *See* Van Cise, *supra* note 59 at 1069–71.

[81] *See* Borger v. Yamaha International Corp., 1980–2 Trade Cas. ¶ 63,373 (2d Cir. 1980); Kaplan v. Burroughs Corp., 611 F.2d 286 (9th Cir. 1979); 579 F.2d 126 (2d Cir. 1978), *cert. denied*, 439 U.S. 946 (1978);

[82] 433 U.S. 36 (1977).

[83] 388 U.S. 365 (1967).

[84] *See* Bohling, *A Simplified Rule of Reason for Vertical Restraints: Integrating Social Goals, Economic Analysis, and* Sylvania, 64 Iowa L. Rev. 461 (1979); Pitofsky, *The* Sylvania *Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 Colum. L. Rev. 1 (1978). For a comprehensive review of post-*Sylvania* litigation, *see* Altschuler, Sylvania, *Vertical Restraints and Dual Distribution*, 25 Antitrust Bull. 1 (1980).

The confusion in subsequent Section 1 litigation is, in part, attributable to this tendency to use *per se* and rule of reason analyses as rules, rather than tools. For example in *Kaplan v. Burroughs Corp.*, the trial court entered a judgment N.O.V. for the failure of plaintiff to prove that the demise of its business was due to any violation of the antitrust laws by the defendant.[85] The court of appeals chose not to affirm or reverse on that basis, but to write an opinion affirming the lower court decision on the basis of the plaintiff's failure to prove a relevant market as part of a Section 1 rule of reason case in a circuit where relevant market is not even an element of an attempt to monopolize case.[86] The opinion is obscure and puzzling on why the court decided to affirm on this basis and impose the requirement of market proof, thereby converting the case from a Section 1 restraint of trade case to a Section 2 monopolization case. One explanation is that once the court saw the case was not within a "rule" of *per se* illegality, it concluded it was necessary to apply the "rule" of reason and no restraint is unreasonable unless it adversely effects or destroys competition in the entire market. For some reason, the court concluded that market analysis was an indispensable element of all rule of reason cases, rather than whether the restraint imposed is justified by legitimate business purposes, and is no more restrictive than necessary—the traditional way of conceptualizing Section 1 rule of reason cases.[87] The inquiry is the same as it is in *per se* cases; *viz.*, whether the competitive process has been unreasonably displaced by a contract, combination or conspiracy and not whether competition has been destroyed in the line of commerce involved.[88]

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[85] 426 F. Supp. 1328 (N.D. Cal. 1977).

[86] 611 F.2d 286 (9th Cir. 1979). *See also* Borger v. Yamaha International Corp., 1980–2 Trade Cas. ¶ 63,373 (2d Cir. 1980) imposing a duty to prove an injury to the entire market in a case charging the illegal refusal to deal in a single product line.

[87] *See* National Soc'y of Professional Engineers v. United States, *supra* note 64; Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976). The *Kaplan* case decision to require proof of an adverse effect on a relevant market in a Section 1 case may also have been ultimately premised on the narrow view that the sole function of the antitrust laws is to maximize consumer welfare as defined by neo-classical price theory. Absent an adverse quantitative impact on the market involved, so the reasoning goes, ultimate consumer welfare is not adversely impacted. This view is erroneous since the courts have long held the purpose of the antitrust laws is to protect and foster the competitive process as the rule of trade. The test for illegality is a qualitative one of the impact of the conduct on the ideal of the competitive process and not the quantitative test of the amount of commerce effected by the practice. *United States v. Socony–Vacuum Oil Co.*, *supra* note 61. The "competitive

The court's methodology evidences a process which treats *per se* and rule of reason analyses as separate rules made up of predetermined elements establishing the major premise of a syllogism for deciding the case. The facts are then made the minor premise; and, if not in conformity with the major premise or some predefined element of the major premise the operations of deductive logic dictate judgment for the defendant. Analysis of the antitrust policies involved is avoided in favor of a paint-by-the-numbers process of legal analysis with little or no examination of why a particular number is required or how it relates to the overall portrait—the policies of the antitrust laws. Jamming the facts into the confines of a predetermined rule is no more enlightening than stating that a price-fixing conspiracy is *per se* unlawful without analyzing what facts will give rise to an inference that the conduct in question is price-fixing and is price-fixing pursuant to a "contract," "combination" or "conspiracy."

Elsewhere, I have called this model of the legal process the "gumball machine" model of legal decision-making and a long-discredited form of legal positivism.[89] Apart from the jurisprudential implications of this mode of analysis, it generates inflexibility in the law, ignores facts not consistent with the assumptions of the model, divorces the analysis from the broad social, political and economic policy goals of the antitrust laws, and encourages a tendency to engage in a mechanical analysis which fails to develop workable and understandable standards for judging other cases. Cases like *Kaplan* and some other recent cases,[90]

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process" embraces values far broader than the maximization of consumer welfare. *See* articles cited *infra* note 107. One value is the right of competitors to succeed or fail free of displacements of the competitive process by the joint action of others unreasonably excluding them from business. *See* Klor's, Inc. v. Broadway–Hale Stores, Inc., 359 U.S. 207 (1959). Moreover, neo-classical price theory is twenty years out of date and a flimsy basis upon which to base the important task of analyzing the facts of antitrust disputes and the policies of the antitrust laws. *See* M. HOLLIS & E. NELL, RATIONAL ECONOMIC MAN (1975); A. EICHNER, A GUIDE TO POST–KEYNESIAN ECONOMICS (1978); Nelson, *Comments on a Paper by Posner*, 127 U. PA. L. REV. 949 (1979).

[88] *See National Soc'y of Professional Engineers v. United States, supra* note 64.

[89] *See* Flynn, *supra* note 32.

[90] *See* Oreck Corp. v. Whirlpool Corp., 579 F.2d 126 (2d Cir. 1978), *cert. denied*, 439 U.S. 946 (1978); Eastern Scientific Co. v. Wilk Heerbrugg Instruments, Inc., 572 F.2d 883 (1st Cir. 1978), *cert. denied*, 439 U.S. 833 (1978). *See also* Borger v. Yamaha International Corp., 1980–2 Trade Cas. ¶ 63,373 (2d Cir. 1980); California Computer Products, Inc. v. I.B.M. Corp., 613 F.2d 727 (9th Cir. 1979).

with their rule-oriented approach to the analysis of Section 1 issues, generate uncertainty and unpredictability within an aura of a false sense of certainty, depart from the reasoned precedent of prior cases, and ignore the policy of the antitrust laws to maintain the competitive process as the rule of trade. By recognizing the *per se* and rule of reason analyses as a single methodology for establishing evidentiary presumptions for allocating the burden of proof in the process of determining whether joint action has displaced competition, courts in antitrust cases would begin to ameliorate the confusion generated by imposing a legalistic rule approach detached from the policy of the law to complex antitrust issues in accord with Justice Jackson's warning: "[O]ur quest for certitude is so ardent that we pay an irrational reverence to a technique which uses symbols of certainty, even though experience again and again warns us that they are delusive.[91]

C. ADOPTION OF DUTY-RISK ANALYSIS FOR TREBLE DAMAGE LITIGATION

Some recent antitrust cases have been gravitating, without acknowledging it,[92] to a framework of analysis known as duty-risk which embraces my previous two reform proposals. The duty-risk method of analysis in torts was developed in response to the confusion generated by relying upon "proximate cause" analysis; as a means for clarifying the line between judge and jury functions and between trial and appellate court functions for review purposes; as a way for requiring an exposure of the basic policy reasons for granting or denying the protection of the law in the process of decision rather than hiding policy decisions behind meaningless notions of "proximate," "remote," and other metaphysical concepts of causation; and as a way for bringing greater predictability to the standards developed for defining what facts will give rise to a finding of illegality.[93] It is apparent that antitrust litigation is in need of a similar infusion of analytical order if we are to have a sensible and comprehensive understanding of who may sue, what violates the law, what standards of proof are required to show a violation, what are questions of law for the court and those of fact for the jury, and what are the appropriate limits of judicial review of lower court decisions.

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[91] FPC v. Hope Natural Gas Co., 320 U.S. 591, 643–44 n.40 (1944) (dissenting opinion). There is, of course, a need for predictability and knowability in antitrust standards so that those subject to the law can sensibly comply with the law and avoid its penalties. Conceptualizing the *per se*/rule of reason analysis as a single methodology for establishing burdens of proof should enhance predictability rather than diminish it by exposing more clearly the analytical processes leading to conclusions like the existence or non-existence of a conspiracy, the category of *per se* conduct, or "unreasonableness" in the context of the facts of the case. Presumptions of unreasonableness will remain relatively stable and knowable enabling lawyers to make sure-footed predictions of legality or illegality in the vast number of circumstances and disputes never litigated. Litigation breaks out where there is uncertainty over some element of the offense, the facts or their implication, or a unique circumstance not fitting neatly existing precedent. Treating the standards as evidentiary presumptions will make trial and appellate court analyses of the reasons for litigating cases more understandable than the present rule-oriented mentality of cases like *Catalano*.

[92] Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); Greyhound Computer Corp., Inc. v. I.B.M. Corp., 613 F.2d 727 (9th Cir. 1979); Reuben H. Donnelly Co., 3 TRADE REG. REP. (CCH) ¶ 21,650 (1979), *rev'd*, 982 ANTITRUST & TRADE REG. REP. (BNA) G–1 (2d Cir., Sept. 25, 1980). It should be noted that adoption of the duty-risk method of analysis does not insure a correct conclusion. For example, the *Berkey* case departs dramatically from prior Section 2 precedent on the duties of a monopolist and invades the functions of the trial court and jury at every turn. The Court's rationale however, is at least exposed to analysis and criticism rather than hidden behind manipulation of otherwise irrelevant concepts.

Briefly stated, duty-risk analysis, as applied to antitrust litigation, establishes the following analytical framework:

1. Is there a factual connection between the plaintiff's injury and the defendant?

2. Do the policies of the antitrust laws and their system of protection extend to the interest that the plaintiff seeks to vindicate; and if some protection is afforded what standard of care does the legal system impose on the defendant?

3. Was that standard of care breached by the defendant?

4. What are the damages?[94]

1. *Factual Connection*

The issue of factual connection contains no element of fault, willfulness, directness, foreseeability or liability. It is a straightforward question, usually not litigated, but occasionally placed in dispute where a defendant denies its conduct is related to the plaintiff's claimed injury. It is the basis upon which the trial court decided the *Kaplan* case,[95] finding no credible evidence by which a jury could conclude that defendant's conduct was factually connected to the plaintiff's claimed injury. Factual connection is also the basis on which the Second Circuit purported to affirm *Reading Industries, Inc. v. Kennecott Copper Corp.*[96] The court confused the question of factual connection in treble damage suits and the question of the sufficiency of proof of damage with the definition of the duties imposed by the antitrust laws. Such an approach engenders unnecessary confusion and ambiguity by loading up the concept of causation with meaningless standards like "remote," "proximate" and "intervening" cause.[97] The appeal of the case on a motion to dismiss for lack of "standing" necessarily admitted the factual connection issue under a duty-risk method of analysis. The issue on appeal was the legal issue of the scope of the duties imposed by the antitrust laws in light of the facts of the case and the goals of the law, not the question of a factual connection between the violation alleged and the damages suffered. Where there is a dispute over factual connection and sufficient evidence on either side could cause reasonable minds to differ, the resolution of the issue is for the jury.[98] Otherwise, the factual connection issue is seldom litigated since few plaintiffs file cases where there is no factual connection between the plaintiff's injury and the defendant, unless they have funds to waste on an unethical strike suit and a trial judge is willing to go along with the suit rather than grant summary judgment.

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[93] *See* L. GREEN, THE LITIGATION PROCESS IN TORT LAW (1965); Thode, *Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Functions Between Judge and Jury*, 1977 UTAH L. REV. 1.

[94] Thode, *supra* note 93.

[95] *Supra* note 85.

2. *Definition of Duty and Standard of Proof of Its Breach*

The second element of duty-risk analysis, whether the antitrust laws' system of protection extends to the interest that the plaintiff seeks to vindicate and, if some protection is afforded, what standard of care the legal system imposes on the defendant, is usually the central issue of the case.[99] This is the question raised by what many courts currently analyze as the "standing" issue. They do so without confronting the issue as one of antitrust policy but analyze it pursuant to meaningless notions of "target area," "direct-indirect," "remote" or "proximate" and so on. In effect, the courts render fundamental antitrust policy decisions when they determine a plaintiff has or does not have "standing" in many cases not involving standing in its traditional sense, but do not say so. For example, in the previously discussed *Long Island Lighting* case,[100] the dismissal of plaintiff's claim of injury for a boycott of Libyan crude on "target area" standing grounds was really a decision that the antitrust laws' system of protection did not extend to a plaintiff deprived of access to a product produced overseas at prices set by the competitive market rather than by defendant's alleged conspiracy to boycott the seller of the product. Viewed from this perspective, *Long Island Lighting* is wrongly decided as a "standing" case, as is the *Reading* case, since the court failed to analyze the antitrust policy reasons for granting or denying relief.

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[96] 1980-2 Trade Cas. ¶ 63,599 (2d Cir. 1980).

[97] *See* Thode, *The Indefensible Use of the Hypothetical Case to Determine Cause in Fact*, 46 TEX. L. REV. 423 (1968); Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543 (1962).

[98] *See* Greyhound Computer Corp. v. I.B.M. Corp., *supra* note 92. To the extent there was a dispute over factual connection in the *Reading* case, *supra* note 96, the decision of the Second Circuit clearly invaded the jury function of resolving disputed questions of fact.

[99] The basic factors analyzed in determining the scope of the duties imposed by the law are the history and purpose of the antitrust laws, administrative concerns, economic insights, moral concerns, justice, and prophylactic concerns. *Cf.* Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1034 (1928).

The policy question is one of defining the scope of the duties imposed by the law in light of the facts unique to the dispute. Instead, the court, analyzed the claim under the rubric of a moving "target area" in the sense of identifying the geographic area in which the defendants *intended* to eliminate competition, thereby using standing as a surrogate for inserting an intent element in plaintiff's Section 1 claim without saying so. While the later decision of *Illinois Brick Co. v. Illinois*[101] would have served as a possible basis for dismissing the claim since the utilities were indirect purchasers, confusion was generated by the decision because what the court decided and what it said it was deciding were two different things. It may be appropriate—although I do not agree with it—to use the standing concept in some limited circumstances to maximize economies in the use of judicial resources by limiting access to the courts of those whose injuries are derivative of antitrust injury to another.[102] It is an unnecessary and confusing line of analysis, however, to base the analysis on something else, thereby avoiding discussion or litigation by the parties of the real reasons why courts are using the "standing" concept in antitrust cases.

In most cases, "standing" is not being used as a measure of the limits of judicial economy, but for requiring proof of intent in Section 1 cases *sub rosa* or otherwise narrowing the scope of antitrust constraints on anticompetitive behavior wandering about in the mythical world of target areas.[103] What is at issue in most cases passed off as "standing" cases is the scope of the duties imposed by the antitrust laws upon defendants charged with conspiring to displace competition as the rule of trade and the extent of the risks from which plaintiffs are protected and may seek treble damages for a breach of duties owed them under the antitrust laws. Analyzing these issues under the meaningless concepts of "target area," "direct-indirect" and so on only furthers the growing chaos in Section 1 and Section 2[104] litigation, and does so unnecessarily. When "standing" issues are seen as problems of defining the scope of the duties and risks established by the antitrust laws in light of the basic policies of the law in the environment of treble damage litigation, the chaos will be minimized and the courts can begin to develop understandable tests defining the outer bounds of antitrust liability in light of the policies of the antitrust laws.

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[100] 521 F.2d 1269 (2d Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976).

ra note 30.

See, e.g., Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971). *Long Island Lighting* could have been analyzed on this basis but the court would have had to examine whether judicial economy would be adversely effected by recognizing plaintiff's claims rather than the focus of some imaginary "target" of the conspiracy. The trial court's decision in *Reading Industries*, under this line of analysis, is clearly decided wrongly as a standing case, since Reading's claims were not derivative of an antitrust injury to others. The court of appeals decision compounds the confusion by deciding the definition of the duty imposed by the law on a mishmash of causation, standing, and damage issues and does so without a factual record upon which to decide rationally any of these issues.

The central policy issues in this second element of duty-risk analysis are what duty does the Sherman Act impose upon those engaged in trade or commerce, what corresponding risks are competitors entitled to be protected from by virtue of the treble damage provisions of Section 4 of the Clayton Act, and what standard of proof will be required to prove a breach of the duty. These are questions of law for the court to determine, while the third element of duty-risk analysis—whether the duty has been breached—is one of fact for the jury to decide pursuant to instructions on the duty and the standard of proof for finding a violation framed by the court. The basic duty imposed upon those engaged in trade or commerce is to avoid displacing the competitive process by collaborative action in violation of Section 1[105] or displacing the competitive process by a unilateral or conspiratorial exercise or possession of monopoly power or attempt to monopolize in violation of Section 2[106] of the Sherman Act.[107] A corresponding right to be protected from the risks of a displacement of the competitive process is vested in competitors and consumers injured in their business or property by an unreasonable displacement of the competitive process in vi-

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[103] *Compare* Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971) *cert. denied*, 406 U.S. 930 (1972) (wrongly decided as a standing case since the plaintiff lessor's claims were against its lessee and not derivative of any lessee antitrust claims), *with* Malamud v. Sinclair Oil Corp., 521 F.2d 1142 (6th Cir. 1975); Mulvey v. Samuel Goldwyn Productions, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971).

[104] For a confused Section 2 "standing" case, *see* California Computer Products, Inc. v. I.B.M. Corp., 613 F.2d 727 (9th Cir. 1979). The case is also a good example of the misuse of economic models as rules dictating legal consequences, without an analysis of the facts of the case or the policies of the law.

[105] Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 50–52, 61–62 (1911); United States v. Socony–Vacuum Oil Co., 310 U.S. 150, 224 n.65 (1940). It should be noted that there are other conceptualizations of the nature of the duties imposed by the antitrust laws. Professor Bork, for example, defines the duties as ones imposed on courts under a curious Pareto optimality standard for measuring the

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R. Bork, The Antitrust Paradox: A Policy at War with Itself (1978). Bork accomplishes this through his definition of the concept of the kind of "competition" he believes the antitrust laws ought to protect: "Competition may be read as a shorthand expression, a term of art, designating any state of affairs in which consumer welfare cannot be increased by moving to an alternative state of affairs through judicial decree." *Id.* at 61. Shifting the focus of antitrust duties from ones imposed on private parties to ones imposed on courts has no basis in the legislative history or express language of the statute. While libertarian or other political movements may favor abolishing the antitrust laws or limiting judicial intervention in the economic sphere to ones enhancing "efficiency," the statute has not been amended to accomplish these objectives. The focus remains joint action restraining trade, not judicial opinions, not enhancing "efficiency" and "consumer welfare."

[106] *Supra* note 105. *See also* United States v. Aluminum Co. of America, 148 F.2d 416, 427–29 (2d Cir. 1945).

[107] Definition of the duty in this way includes but is not limited to the neo-classical conception of the purposes of the antitrust laws: to maximize consumer welfare in the sense of short-run price competition as defined by the outmoded and artificial models of neo-classical price competition. *See* R. Bork, The Antitrust Paradox: A Policy at War with Itself (1978). The ideological debate over this issue is the central issue in defining the scope of the duties imposed on defendants and the risks plaintiffs are protected from by the Sherman Act. In light of the legislative history of the Act, judicial experience in enforcing it and the unreality of the assumptions of neo-classical models (see authorities cited *supra* note 32 and note 87), I side with Blake and Jones, Leff, Pitofsky, Schwartz, Sullivan and others in viewing competition as including broader economic, political, and social goals than those defined by neo-classical economic theory. *See* Blake & Jones, *The Goals of Antitrust: A Dialogue on Policy*, 65 Colum. L. Rev. 377, 422 (1965); Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 Va. L. Rev. 451 (1974); Pitofsky, *The Political Content of Antitrust*, 127 U. Pa. L. Rev. 1051 (1979); Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 U. Pa. L. Rev. 1076 (1979); Sullivan, *Antitrust, Micro-economics, and Politics: Reflections on Some Recent Relationships*, 68 Calif. L. Rev. 1 (1980); Sullivan, *Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?*, 125 U. Pa. L. Rev. 1214 (1977); Schwartz, *On the Uses of Economics: A Review of the Antitrust Treatises*, 128 U. Pa. L. Rev. 244 (1979). *See also* C. Kaysen & D. Turner, Antitrust Policy ch. 1 (1965); Letwin, Law and Economic Policy: The Evolution of The Sherman Antitrust Act (1965); F. Scherer, Industrial Market Structure and Economic Performance ch. 1 (1970); H. Thorelli, The Federal Antitrust Policy—Organization of an American Tradition (1955). Many of the cases discussed herein have been generating confusion in light of past precedent because they proceed from the seldomly discussed or articulated assumption that the sole goal of antitrust policy is to maximize consumer welfare in the sense of short run price competition defined in terms of the arbitrary limitations and assumptions of neo-classical price theory. Such an assumption can lead to a requirement of market analysis in Section 1 cases, clearly inconsistent with the adoption and use of *per se* evidentiary standards and the view that the Sherman Act is designed to protect the competitive process. *See* discussion, *supra* note 87. To coin a cliché: The antitrust laws are designed to protect the competitive process, not short-run "consumer welfare."

olation of Sections 1 and 2 of the Sherman Act under Section 4 of the Clayton Act.[108] It is the job of the court to translate the duty into workable standards in light of the circumstances of the case; a task simplified to some extent by the evidentiary presumptions allocating burdens of proof found in recognized *per se* precedent from past cases or an examination of the factors relevant to a rule of reason method of analysis elsewhere. *Per se* evidentiary presumptions do not define the duty but establish factual patterns where it will be presumed that an unlawful breach of the duty—displacement of the competitive process pursuant to a contract, combination or conspiracy—has taken place. Notions like foreseeability and the derivative nature of the plaintiff's claim may be used to limit the definition of the duty where it is consistent to do so with the basic policy objectives of the Sherman Act. Such limitations can be adjusted to the particular circumstances of the case before the court in defining the legal standards of proof of a breach of the duty for the consideration of the jury in performing its fact finding function. Proof that the competitive process has been displaced can be determined by establishing the factual predicates of a *per se* evidentiary presumption or by the evidentiary process of a rule of reason method of analysis—methods for allocating the burden of proof among the parties and bringing analytical order to the litigation of the case.

Viewed from this perspective it is plain that cases like *Kaplan v. Burroughs Corp.*,[109] *Oreck Corp. v. Whirlpool Corp.*,[110] *Borger v. Yamaha International Corp.*,[111] and *Eastern Scientific Co. v. Wild Heerbrugg Industries*,[112] engender unnecessary chaos in Section 1 litigation by their *method* of analysis. *Kaplan's* requirement that a plaintiff prove a relevant market in a Section 1 case and a quantitative impact in that market is unnecessary if one views the purpose of Section 1 as protecting the plaintiff from a contract or conspiracy unreasonably displacing the competitive process as the mechanism for determining plaintiff's success or failure in trade or commerce. Whether the rest of the market is impacted or not is usually not relevant in Section 1 cases to a determination of whether a plaintiff's rights under the antitrust laws have been violated.[113] By the same token, the requirement of proving an effect on a relevant market in *Oreck* misperceived the nature of the duties imposed on defendants and the rights granted plaintiffs by Section 1 of the Sherman Act. Relying upon the misleading cliché, "the antitrust laws protect competition not competitors"[114] (there can be no competitive process without competitors), the court held Oreck must show not only that its business was terminated by a conspiracy between Whirlpool and Sears but that the conspiratorial conduct was anticompetitive in the vacuum cleaner industry as a whole.[115] Again, market definition and impact were made a part of Section 1 analysis, while the real question was one of fact for the jury (subject to suitable instructions on the standard of proof) as to whether Whirlpool's refusal to deal with the plaintiff was unilateral or conspiratorial and a conspiracy for anticompetitive purposes, not whether a conspiracy to displace Oreck, if found, resulted in an unreasonable restraint of all trade in the vacuum cleaner market. The antitrust laws prohibit a conspiratorial displacement of the competitive process for an unreasonable purpose or with an unreasonable effect under Section 1 of the Act, as well as destruction of competition in the entire industry under Sections 1 and 2 of the Act.

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[108] 15 U.S.C. § 15 (1973).

[109] 611 F.2d 286 (9th Cir. 1979).

[110] 579 F.2d 126 (2d Cir. 1978), *cert. denied*, 439 U.S. 946 (1978).

[111] 1980–2 Trade Cas. ¶ 63,373 (2d Cir. 1980).

[112] 572 F.2d 883 (1st Cir. 1978), *cert. denied*, 439 U.S. 833 (1978).

[113] The result in *Kaplan*, unlike the way the court got there, may have been appropriate since the trial court found no credible evidence of factual connection between the injury

The recent *Borger* case compounds the confusion by requiring proof of an adverse impact on the market as a whole in a case where there were serious questions of whether there was any factual connection between the plaintiff's claimed injury and the defendants, whether there was any conspiracy to unreasonably displace the competitive process and whether the plaintiff suffered any measurable antitrust injury. Getting off the beaten track in a case where there appeared to be no factual connection between the plaintiff's injury and the defendant in order to inject a requirement of proving a market definition and impact in a case not reaching the duty issue unnecessarily converts a Section 1 case into a Section 2 case, confuses the functions of judge and jury, and denies the plaintiff—assuming the plaintiff can prove the other elements of its case—the rights guaranteed by the Sherman Act to operate its business under the regime of the competitive process. To

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claimed and the defendants. The court of appeals, however, refused to review the case on that basis, thereby confusing the appropriate scope of appellate review. Conversely, the result on appeal in *Reading* is inappropriate since the court did not have a factual basis for the analysis it chose to make and the substantive standards the court relied upon appear to have no recognizable heritage but consist of limping analogies and excessive factual speculation.

[114] Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 133–34 (2d Cir. 1978), *cert. denied*, 439 U.S. 946 (1978).

[115] Where this leaves Klors, Inc. v. Broadway-Hale Stores, 359 U.S. 207 (1959), is a mystery.

coin a cliché, the antitrust laws are designed to protect the competitive process, not competition, competitors, conspirators or monopolists.

The *Eastern Scientific* case sanctions vertical price fixing subject to a rule of reason analysis[116] in the context of a dealer termination for selling below manufacturer set prices outside of its assigned territory. Despite the *Continental TV* footnote condemning vertical price-fixing on a *per se* basis,[117] the court held the economic effect of vertical price-fixing is no greater than that of vertical market divisions and hence must be analyzed on a rule of reason basis. Without debating this conclusion,[118] suffice it to say that *Eastern Scientific* misperceived the duties imposed by Section 1 on defendants and the risks it is designed to protect a plaintiff from; as well as conceptualized the *per se*/rule of reason methodology as substantive rules rather than evidentiary presumptions allocating burdens of proof. Use of the duty-risk analysis would suggest *Eastern Scientific's* method of analysis is in error since it misperceived the duty imposed by the law and avoided confronting an analysis of fundamental antitrust policy and contrary precedent to determine whether vertical price-fixing should be considered presumptively unlawful—difficulties generated by the unartful use of the process in *Sylvania*—while other vertical restraints may not be so considered, or at least not so conclusively illegal.

The other half of the duty analysis is to define the standard of care for proof of breach of the duty. Definition of the standard of care for proof of breach of the duty, once the duty is defined, is a task for the judge as a question of law. In antitrust cases, this problem can be an additional source of confusion since the law permits criminal, civil and equitable remedies for breach of the duty and the conduct relied upon to prove a breach of the duty is frequently difficult to sort out into that which is anticompetitive and that which is procompetitive. Both kinds of conduct injure competitors, and the difficult task of prohibiting the former while not deterring the latter rests with the careful delineation of the duties imposed by the antitrust laws and the careful definition of the standard of care for determining whether the facts support a finding of a breach of the duties.

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[116] Eastern Scientific Co. v. Wilk Heerbrugg Instruments, Inc., 572 F.2d 883 (1st Cir. 1978).

[117] 433 U.S. 36, 51 n.18 (1977).

[118] A conclusion argued for by Bork, *Vertical Restraints:* Schwinn *Overruled*, 1977 SUP. CT. REV. 171 and Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. CHI. L. REV. 1 (1977) and followed by the Fifth Circuit in *In re* Nissan Antitrust Litigation, 577 F.2d 910 (5th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979). The conclusion is premised on the assumption that the sole goal of antitrust policy is the maximization of consumer welfare as defined by neo-classical price theory. *See* discussion, *supra* note 107, for contrary views.

The failure to conceptualize *per se* standards as evidentiary presumptions allocating the burden of proof, to keep separate the definition of the duty and the definition of the standard for proof of its breach or to realize that the standards for proof of a breach of the duty may differ because the remedies sought differ can cause confusion about the implications of cases like *United States v. United States Gypsum Co.*[119] Under a duty-risk analysis, the *Gypsum* case would be viewed as a case raising the problem of defining the evidentiary standard for proving a breach of the duties imposed by Section 1 where the remedies sought are criminal penalties. There is no difference in the duty imposed of not fixing prices by conspiracy from that found in civil litigation charging the same presumptively unlawful conduct, but there is a difference in the level of proof required to show a *breach* of the duty before a jury may convict the defendants of a felony. Purpose *and* effect are required, while in civil cases purpose *or* effect is normally sufficient to show a violation. This is not an irrational or inconsistent state of affairs generating confusion for lawyers attempting to square *Gypsum* with prior precedent creating a presumption of *per se* illegality for conduct with a purpose *or* effect of fixing prices. Requiring some level of willful or intentional conduct before convicting someone of a crime is consistent with the purpose of criminal sanctions and notions of fairness, while requiring proof of an unlawful intent in civil cases is unnecessary since the remedy of damages is designed to make a wrongfully injured plaintiff whole as well as deter violations of the law. By understanding *per se* rules as evidentiary presumptions allocating the burden of proof in conjunction with the function of the court in determining the standard for proof of a breach of the duties imposed by the law in a duty-risk framework of analysis and in light of the remedies sought, cases like *Gypsum* do not jolt the symmetry of Section 1 analysis, but fit neatly within its parameters and the duty-risk framework of analysis.

Requiring proof of an anticompetitive intent in private damage cases, instead of using confusing surrogates for intent by misapplying concepts like standing and relevant market analysis, may be appropriate in some cases. For example, intent may also be a part of the analysis of the duties imposed by the law in cases where an injury is consequential or remote. Limiting liability to that which is foreseeable or is the natural consequence of acts knowingly done, may be an appropriate method for limiting liability by narrowing the definition of the duty or increasing the standard for proof of its breach in circumstances where liability may otherwise be catastrophic. Definition of the duty is to be determined by an examination of the basic policies of the Sherman Act, the legislative purposes in passing the act, fairness to the parties, judicial experience in enforcing the act as revealed by precedent, insights from economics and other disciplines deemed relevant and the circumstances of the case. It is conceivable that an examination of these factors may demonstrate that intent may be useful in defining the duty particularly under Section 2 of the Act or that intent may be a necessary element for raising the level of proof necessary to show a breach of the duty (the standard of care) in close cases of sorting out conduct which has the earmarks of both procompetitive and anticompetitive effects.

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[119] 438 U.S. 422 (1978).

For example, vertical market restraints as to customers and territories may be classified presumptively *(per se)* unlawful where they are adopted with an intent to displace the competitive process rather than achieve some legitimate business purpose clearly identified and objectively necessary to the business. In vertical refusal to deal cases, where it is claimed that the refusal to deal is the product of an anticompetitive agreement between a supplier and a customer competing with the plaintiff, it may be justified to require a standard of proof including a showing of an intent to displace the competitive process before a jury may find liability. Including intent in the definition of the duty serves as a vehicle for sorting out the procompetitive and anticompetitive consequences in vertical customer and territorial restraints; while inserting an intent requirement in the standard for proof of a breach in vertical boycott cases provides a vehicle for sorting out the close factual questions frequently found in joint vertical conduct resulting in a refusal to deal. Once the duty has been clearly defined and the standard for proof of its breach has been set forth by explaining the elements for allocating the burden of proof among the parties in light of the remedies sought, however, it is a jury's function to determine whether the disputed facts prove or disprove a breach of the duty, and it is the constitutional right of all parties to the litigation to have the jury so decide.

3. *Whether the Duty Is Breached*

The failure to keep separate the issues of defining the duties imposed by the antitrust laws and the standard of proof necessary to show a breach, questions of law for the court, and the issue of whether the standard of care *is* breached by the defendant under the facts of the case, a question of fact for the jury, has also led to confusion in recent litigation. Doubts about the latter, a function belonging to the jury, appear to cause courts to require more on the former; a subtle way of invading or limiting the jury's function. For example, in *Oreck* doubts about whether Oreck was terminated because of failure to carry out Whirlpool's marketing policies, rather than a conspiracy by Sears and Whirlpool to terminate Oreck because Oreck was undercutting Sears' prices, appear to have caused the court to require Oreck to prove the conspiracy restrained competition in the market for all vacuum cleaners as well as proof that the conspiracy was one to terminate Oreck for successfully competing with Sears. Doubts about the factual strength of the plaintiff's proof of a breach of the duty should not be allowed to cause the court to redefine the legal elements of the duty imposed by the law or the standard for proof of its breach. Summary judgment and judgment N.O.V. are designed to remedy such a state of affairs, not the distortion of the definition of what it is that violates the law and how much evidence is necessary to prove a breach. Where the facts are sufficient to cause reasonable minds to differ over the existence of a conspiracy or whether its purpose is inconsistent with the operation of a competitive process, the issue is one for the jury to decide. Trespass upon the jury function is not only un–American and a violation of the constitutional right to jury trial, but it generates confusion in the litigation of cases by making unclear what are questions of fact and those of law. The *Borger* and *Kaplan* cases appear to insert a requirement of market analysis in a plaintiff's Section 1 case for the same reason and with the same undesirable consequences. The effect in all three cases is to confuse the functions of judge and jury and the appropriate limitations of appellate review of contested lower court fact-findings as well as to confuse one's understanding of what violates the law and how one proves or defends a case. Aside from concerns with interferences with the Seventh Amendment right to jury trial, confusing issues of fact for the jury with those of law for the court creates chaos for those using the case as precedent for guiding a client's future conduct, litigating a case raising similar issues, and drafting instructions for a jury.

Moreover, differing judicial perceptions of the factual strength of a particular plaintiff's case can cause the substantive standards of the Sherman Act to mean legally different things from one court and from one case to the next. In vertical boycott cases, for example, depending upon which circuit the case happens to be brought in, a vertical boycott is either *per se* unlawful or subject to a rule of reason analysis with the added requirement of proof of an adverse impact on a relevant market.[120] This is not a happy state of affairs in the evolution of our uniform national policy of fostering a competitive process. Judicial intrusions on jury functions and intrusions by appellate courts on the functions of trial courts, because a judge does not believe what the jury found or dislikes treble damage cases, should not be allowed to distort the definition of the duties or standard for proof of a breach imposed by the law. Vertical boycotts, done with the purpose and effect of displacing a competitor deny that competitor the right to succeed or fail under the regime of a competitive process. They should be declared presumptively unlawful subject to rebuttal that the purpose or effect of the conduct was not the product of a conspiracy to exclude a competitor or was to achieve a legitimate business objective by the least restrictive means available.

Perhaps the future evolution of Sherman Act standards in the context of private damage litigation and within the framework of duty-risk method of analysis, forcing courts to keep judge and jury functions separate, may result in higher *standards* of proof in some types of treble damage litigation—but not different definitions of the duty imposed by the law—before a jury may find a violation of the law where the evidence is subject to being interpreted as procompetitive, anticompetitive or unrelated to the plaintiff's claim of injury. In such circumstances, it may be necessary, assuming there is sufficient evidence to go to the jury, to require a private plaintiff to prove the purpose *and* effect of the joint action is to displace competition rather than stimulate it before the private plaintiff recovers three times his actual damage. If such were not required, differentiating between procompetitive and anticompetitive conduct may be insurmountable under an instruction which permits a finding of liability on effects alone. Trespass upon jury functions by distorting the definition of antitrust duties by appellate and trial courts will continue apace, however, if courts continue to fiddle with standards for defining what violates the law, in order to avoid imposing liability in what a particular judge believes is a factually weak case.

4. *Damages*

The fourth issue, one for the jury under appropriate legal standards developed by the court in its instructions, is proof of the fact and amount of antitrust damage. No elaborate examination of this issue will be undertaken here except to note that some cases may present the unique situation of proof of an antitrust violation without antitrust damage[121] or that the plaintiff has suffered no measurable harm as a result of the defendant's conduct. These kinds of cases present issues of law for the court. Normally, however, the fact and amount of damages are questions of fact for the jury subject to appropriate instructions by the court. Before a plaintiff may recover, of course, sufficient evidence on the fact and amount of damage, as well as the other three elements of duty-risk analysis, must be introduced in evidence. By the same token, plaintiffs should at least be allowed the opportunity to establish the basis for their claim of damage and their method for measuring the amount of damage before being thrown out of court on grounds that damages are speculative. Judicial speculation about the speculative nature of damage proofs in a particular case, without a factual base for the judicial speculation, is scarcely a fair or orderly use of the judicial process. The Second Circuit's decision in *Reading*, partially premised on such a process, appears to have been a smoke screen for dismissing a case the court for some unexplained reason considered "bizarre" to begin with.[122] Such an approach to complex antitrust litigation, is scarcely illuminating, orderly or appropriate decision-making. Confusing one element of the case with another can result in deciding neither element correctly with the result of killing off meritorious claims or retaining those without merit at early stages in the litigation.

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[120] *Compare* Oreck v. Whirlpool, 579 F.2d 126 (2d Cir. 1978), *and* Kaplan v. Burroughs Corp., 611 F.2d 286 (9th Cir. 1979), *with* Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (2d Cir. 1979). *See* Comment, *Vertical Agreement As Horizontal Restraint:* Cernuto, Inc. v. United Cabinet Corp., 128 U. PA. L. REV. 622 (1980).

Failure on any one element should result in dismissal of the plaintiff's case, a jury finding of no liability, or post-verdict motions disposing of the case in the event the jury does find liability. Sufficient evidence on all four elements of the case to go to a jury, should exclude the court from all but the traditional court functions of instructing the jury, guiding the trial, and curbing abuse of the jury function by post verdict motions. What Congress has given under Section 4 of the Clayton Act and what the Constitution has established under the Seventh Amendment, courts should not take away by improper and confusing manipulation of standing concepts, confusing one element of the claim with another and the growing chaos of substantive Section 1 standards for proof of a violation of the law.

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[121] *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. 429 U.S. 477 (1977); Areeda, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127 (1976). The Second Circuit's opinion in *Reading*, was in part based on an assumption that proof of damages in the case was unduly complex and that *Illinois Brick*, by analogy, required dismissal of claims presenting complex damage issues. No factual basis for the court's assumption was established since the lower court dismissed the claim on "standing grounds." Nor does the curious rationale of *Illinois Brick*, *see supra*, note 30 support by analogy the court's affirmance on the grounds that proof of damage would be speculative. The primary concern in *Illinois Brick* appeared to be one of mutuality rather than undue complexity of damage proofs. In both *Reading* and *Illinois Brick*, the central issue is one of defining the scope of the duties imposed by the antitrust laws in light of the context of the litigation, the policies of the antitrust laws, practical administration of the law, justice as between the parties, prior decisions, common sense and the environment in which the case arose. *Cf.* Thode, *supra* note 93 at 26–30. Deciding complex and difficult duty issues by ignoring these policy considerations and the facts of the controversy while relying on meaningless concepts of mutuality or causation or deciding the controversy before the court by hypothetical or speculative cases not before the court, as the courts have done in *Illinois Brick* and *Reading*, generates further litigation, uncertainty in who may sue and what violates the law, and an undermining of the goals of the antitrust laws. *See supra* note 56.

[122] 1980–2 Trade Cas. ¶ 63,559 (2d Cir. 1980 at 76,975.)

III. CONCLUSION

The *way* we think about an area of law is at least as important as *what* we think about it. The major focus of debate in antitrust circles and the courts in recent years has been about *what* we think of changes in fundamental doctrine and not about the methodology or the *way* we think about antitrust cases. Most of the current debate on antitrust issues has been about the conclusions and not how the courts are getting there. The latter question is a subtle one, but I believe a very important one. Ignoring the way we think about and organize antitrust analysis is a primary cause of the growing chaos in Section 1 and Section 2 litigation. Analyzing issues of basic antitrust policy as "standing" issues and doing so under meaningless subjective notions of "target area" and the like has been one source of the confusion. Treating the *per se*/rule of reason analysis as two separate sets of legalistic rules rather than one common methodology establishing various levels of evidentiary presumptions for allocating the burden of proof in determining whether or not competition has been unreasonably displaced is another source of confusion. Courts end up analyzing the law in light of the facts, rather than the facts in light of the law. Facts not fitting the preordained model of the legalistic rule are ignored and the basic policies of the law become lost in irrelevant legalisms not related to the claim before the court or to the policies which the law is designed to foster. Failure to keep analytically separate questions of fact and those of law, while using clichés and "standing" jargon to decide fundamental issues of antitrust policy, has been the source of additional confusion. Adoption of the duty-risk framework for analyzing the issues will avoid all these pitfalls, while exposing to debate the antitrust issues involved, separating intelligently the judge and jury—trial and appellate court—functions and establishing a flexibility in the law that is knowable and predictable.

Even if the courts do not adopt any of the reforms I have urged here today, lawyers will still need to do so if they are to understand what the courts are deciding, advise their clients and assess the strengths and weaknesses of a case they are bringing or defending. If they fail to do so, they will find themselves cast into the darkness—a darkness which has been generating an increase of wailing and a gnashing of teeth over the growing chaos in the cases. It is a chaos where cases are dismissed long after they are filed on some finding that an injury is caused by a "ripple"; trial of cases is confused by uncertainty of what each side must prove and uncertainty over instructions for juries; and, appeals of cases are decided on grounds not argued or litigated below. The results are a growing darkness over the issues of who may sue, who may be sued, what legal standards apply, and what evidence is sufficient to show that a violation has occurred. The proposals for changes in the *way* lawyers analyze and think about treble damage litigation are not easy to digest on such short notice nor will they settle all the difficult antitrust policy issues to be found lurking in the vicinity from case to case. But these three proposals for the reform of the *way* we think about antitrust questions will expose those issues to rational debate and provide an orderly analytical framework for intelligently comprehending evolving antitrust policy where there is now fog, quixotic judgments and a confusion of analysis. It is, after all, the function of light to illuminate the object, not explain it.

PREPARED STATEMENT OF MARK M. SINGER, PRESIDENT, NATIONAL FOOD BROKERS ASSOCIATION, INC.

This statement is submitted concerning the Subcommittee's consideration of the Justice Department enforcement policy with respect to price discrimination. ¼The National Food Brokers Association (NFBA) wishes particularly to comment on the statement by Assistant Attorney General William F. Baxter on the Robinson-Patman Act.

NFBA is a national non-profit trade association composed of nearly 2,500 food broker firms. Food brokers are independent sales representatives performing essential sales functions for a number of manufacturers (average is 23) of food, grocery, or related products. Food brokers sell on terms set by the manufacturers they represent to wholesalers, supermarket firms, industrial users, and foodservice operations.

Mr. Baxter makes a number of criticisms of the Robinson-Patman Act, saying it fosters inefficiencies in distribution by discouraging buyer initiative and hampering promotional activities.

NFBA members have intimate knowledge of day-to-day sales transactions and promotional activities in food and grocery distribution. They know from experience that the Robinson-Patman Act does not cause inefficiencies in distribution. Food brokers know that food and grocery distribution is highly competitive and that buyers vigorously seek price reductions from manufacturers. Buyers are not afraid to exert pressure on suppliers for the lowest price.

In the same manner competitive pressures encourage buyers to seek promotional payments under programs arranged by manufacturers. Sales promotion programs are common in food and grocery distribution. They respond to consumer preferences. There is no evidence whatsoever that the Robinson-Patman Act hampers promotional activities.

Mr. Baxter offered no support for his charges that the Robinson-Patman Act discourages buyers from demanding price concessions from suppliers. He did not support his statement because there is no such support. Experience in the food and grocery distribution industry refutes his allegations.

The Robinson-Patman Act originated out of economic conditions similar to those prevailing today. In the 1930's, unemployment was high and the general economy was depressed. Small business was especially threatened by economic adversity.

During this period, national concern was expressed that price discrimination existed to such an extent that the survival of small merchants, manufacturers, and other businessmen was seriously imperiled. The Federal Trade Commission investigated and found that the ability of large buyers to purchase merchandise at a lower cost than their smaller competitors was a primary feature of market conditions. The Commission's report revealed that these lower costs frequently found expression in the form of special discounts, concessions, or collateral privileges which were not available to smaller purchasers. Commenting on the extent to which demands for price discrimination prevailed, the Federal Trade Commission in its investigation interviewed one hundred and twenty-nine manufacturers in the grocery group, seventy-six of which admitted that preferential treatment in some form was given. Thirty-three of the manufacturers interviewed stated positively that threats and coercion had been used by large buyers to obtain preferential treatment. Dissatisfaction developed over what was then regarded as the clear inadequacy of the antitrust statutes to prevent harmful discriminatory practices.

The purpose of the Robinson-Patman Act, stated in the words of its Congressional creators, is "to restore, so far as possible, equality of opportunity in business by strengthening antitrust laws and by protecting trade and commerce against unfair trade practices and unlawful price discrimination, and also against restraint and monopoly for the better protection of consumers, workers, and independent producers, manufacturers, merchants, and other businessmen."

In more precise terms, the objective of the Act is to suppress discrimination between competing customers of the same seller not supported by sound economic differences.

Behind the Act was an overriding fear that powerful buyers were free to exert their superior economic strength in such a way as to harm and injure the competitive capabilities of smaller competitors. A decision was made to institute and support a social and economic policy for the nation aimed at preventing harmful discrimination in trade and commerce.

That decision was made by Congress 46 years ago when it passed the Robinson-Patman Act. The law remains on the statute books today.

It is the duty of the Department of Justice and the Federal Trade Commission to enforce the Act as Congress intended. As a Federal official sworn to uphold the law, Mr. Baxter has an obligation to enforce the Robinson-Patman Act regardless of his disagreement with its policy set by Congress.

The Robinson-Patman Act was enacted to prevent large buying organizations using economic pressure to gain unfair price preferences. The act is directed against oppressive discriminations. As such, the law is fully justified on the basis of public policy and benefit to the competitive economy.

NFBA is on record as a strong supporter of the Robinson-Patman Act. It opposes legislation weakening the Act and urges agencies charged with its enforcement be encouraged to meet their responsibilities.

NFBA thanks the Subcommittee for allowing it to present this statement.

PREPARED STATEMENT OF JAMES D. "MIKE" MCKEVITT, DIRECTOR OF FEDERAL LEGISLATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS

The National Federation of Independent Business (NFIB), which represents more than 505,000 small, independent businesses across the country, is pleased to have this opportunity to comment on recent developments in antitrust policies and enforcement, and effects on small business.

Specifically, I would like to comment on resale price maintenance policies recently expressed by Mr. William F. Baxter, Assistant Attorney General for the Antitrust Division of the Department of Justice. Mr. Baxter has determined that resale price maintenance, the practice of allowing the manufacturer of a product to control the price at which an independent retailer may sell the product, should not be a per se illegal vertical restraint on trade. It is his objective to have the courts apply the "rule of reason" test as articulated by the Supreme Court in *Standard Oil Company* v. *United States*, 221 U.S. 1 (1911). Such a policy would permit resale price maintenance where it is not an unreasonable restraint of trade. Of course, the courts would determine what is unreasonable. The effect would be much greater control by manufacturers over retail prices.

The Supreme Court originally declared resale price maintenance illegal in *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911). Shortly after that decision, Congress exercised its supremacy clause powers and authorized the states to enact "fair trade laws" that allowed the practice. In 1975, however, Congress repealed the authorization and resale price maintenance once again became per se illegal.

This action by the Congress in 1975 was apparently greeted with approval by the small business community. In August 1982, the NFIB asked its 505,000 members, "Do you favor or oppose the Fair Trade Laws?" An overwhelming majority (73%) responded that they opposed fair trade laws. Only 16% favored the laws and 11% were undecided. This strong reaction to the idea of fair trade laws and resale price maintenance should prove that only a small percentage of businesses perceive resale price maintenance as advantageous.

Economists and lawyers, who have debated the effects of resale price maintenance for scores of years, agree that resale price maintenance stifles intrabrand competition. This is because it takes from retailers one of the tools most often used to compete. That tool is price. Manufacturers may deem it advantageous to have retailers provide more services to their customers or to provide more advertising for a product. Through creation of a minimum retail price, retailers are forced to compete on a nonprice basis. They must compete by increasing services and promotion. Such nonprice competition would increase each seller's costs until, in a competitive retail market, the retailers' marginal cost equalled the resale price maintenance cost. In effect, resale price maintenance forces retailers to compete in the interest of the manufacturer. Consequently, although interbrand competition is enhanced, intraband competition is restrained.

If we all agree that vigorous competition creates a stronger business community, then we should recognize that a decrease in intrabrand competition will weaken that sector of the business community that engages in intrabrand competition. Small retailers, a very large percentage of small businesses, are the businesses that most often engage in intrabrand competition. To weaken the economic strength of small retailers by restraining intrabrand competition is unwise. Small businesses create a disproportionately large number of jobs, provide an economic foundation for our cities and have become a symbol of independence. To stifle intrabrand competition is to stifle small business.

Such an economic policy will have measurable and undesirable economic effects. Therefore, the decision to pursue such a policy should not be left to the bureaucracy, or to Mr. Baxter. Only the Congress should determine what the nation's policy is in regard to resale price maintenance.

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